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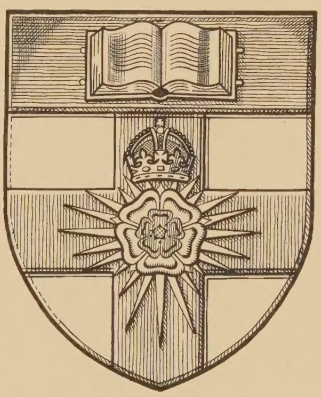

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THE

LAW REPORTS.

Probate Division.

IN THE COURTS OF PROBATE AND DIVORCE

REPORTED BY

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JOHN G. MIDDLETON, LL.D., Advocate; and
ROBERT A. PRITCHARD, D.C.L., Advocate;

IN THE ADMIRALTY AND ECCLESIASTICAL COURTS

BY

GAINSFORD BRUCE, Barrister-at-Law;

IN THE PRIVY COUNCIL

BY

HERBERT COWELL, Barrister-at-Law;

AND

IN THE COURT OF APPEAL

BY

CHARLES MARETT, MARTIN WARE, and
H. CADMAN JONES, Barristers-at-Law.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

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OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

XLI VICTORIA.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Right Hon. Sir ROBERT PHILLIMORE, Knt., D.C.L.

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OF

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PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

XLI VICTORIA

[IN THE COURT OF APPEAL.]

1877
Nov. 26.

SOTTOMAYOR, OTHERWISE DE BARROS *v.* DE BARROS.

Nullity of Marriage—Consanguinity—Marriage illegal by the Law of Domicil.

The petitioner and respondent, Portuguese subjects domiciled in Portugal, and first cousins to each other, came to reside in England in 1858, and in 1866 they went through a form of marriage before the registrar of the district of the City of London. In 1873 they returned to Portugal, and their domicil throughout continued to be Portuguese. By the law of Portugal a marriage between first cousins is illegal, as being incestuous, but may be celebrated under a Papal dispensation :—

Held, reversing the decision of the Court below, that the parties being by the law of the country of their domicil under a personal disability to contract marriage, their marriage ought to be declared null and void.

Simonin v. *Mallac* (2 Sw. & Tr. 67 ; 29 L. J. (P. M. & A.) 971) distinguished.

6 P.D. 38
8 P.D. 166
9 P.D. 2

APPEAL by the petitioner from the decision of Sir R. Phillimore, dismissing a petition to have her marriage declared null and void. The facts are fully stated in the report of the case in the Court below (1).

(1) 2 P. D. 81.

A hasty marriage held void 5 P.D. 94
5 P.D. 94

1877

SOTTOMAYOR v. DE BARROS.

July 20. *Inderwick, Q.C., Dr. Tristram,* and *Bayford,* for the appellant. The law of the place governs the forms and ceremonies requisite to a valid marriage: *Conway, otherwise Beazley* v. *Beazley* (1); but the cases carry the rule no further. This case is governed in principle by *Brook* v. *Brook* (2), where a marriage between a man and his deceased wife's sister, both being domiciled British subjects, was held invalid, though solemnised in a country where such marriages are lawful. *Steele* v. *Braddell* (3) lays down the principles as to minors. They are under no incapacity to marry in England, Scotland, or Ireland, but in England and Ireland consents are required, and in Scotland not. A marriage between English and Irish minors in Scotland was therefore held good, the consents being only a part of the forms and ceremonies. *Warrender* v. *Warrender* (4) lays down the same principle, that the lex loci is looked to so far only as relates to the forms and ceremonies.

[COTTON, L.J. In the case of *Brook* v. *Brook* (2) the parties were under an incapacity imposed by our own statute law. A case where, on the ground of a foreign law, we are asked to declare a marriage bad, which would have been perfectly good if the parties had been English subjects, seems to be in a different position.]

The cases referred to establish the principle that a marriage between two persons who by the law of the country of their domicil cannot intermarry is void wherever it is solemnised.

Willis, Q.C., and *Jacques,* for the Queen's proctor. According to the law of England, the validity of a marriage is determined by the lex loci contractûs, subject to two exceptions, that if a domiciled Englishman applies to the courts of his own country, they will not recognise his marriage if forbidden by our law, and that a marriage which, by the general consent of Christendom, is incestuous, will be deemed invalid, though allowed by the law of the place where it was solemnised. In *Brook* v. *Brook* (2) the lex loci is treated as governing the solemnisation and the capacity of the parties to contract. That a marriage generally looked upon as incestuous would not be recognised is admitted, but this is not

(1) 3 Hagg. Eccl. 639.
(2) 9 H. L. C. 193.
(3) Milw. Ir. Eccl. Rep. 21.
(4) 2 Cl. & F. 488, 530.

such. The other exception is illustrated by the *Sussex Peerage Case* (1), where the marriage was valid according to the laws of Rome, where it was celebrated, but the application was made to the courts of our own country, where such a marriage was illegal under the provisions of the Royal Marriage Act.

[JAMES, L.J. Does your argument involve this—that if the Duke of Sussex had acquired real estate in France, and become domiciled there, his children could have inherited?]

No; the consequences of the marriage must be determined by the law of the domicil. The courts of any country may decline to give to a marriage the full effect which it would have had if conformable to their own law, and yet decline to declare that the parties have been living in concubinage: Burge, Foreign and Colonial Law, i., pp. 184, 188.

[JAMES, L.J. Those passages appear hardly consistent with *Brook* v. *Brook*. (2)

BAGGALLAY, L.J. Suppose the parties had gone to Madrid, would they be treated by the courts of Madrid as legally married?]

The courts of Madrid must give effect to the lex loci contractûs. *Simonin* v. *Mallac* (3) governs the present case. *Conway* v. *Beazley* (4) comes within the principle of *Brook* v. *Brook* (2), which is quite consistent with *Simonin* v. *Mallac*. (3) The question is discussed in Burge, Foreign and Colonial Law, i., p. 195. *Warrender* v. *Warrender* (5) does not apply, for it was a case of divorce, which depends on the domicil. [Wharton on Conflict of Laws, ss. 160, 161, and *Ruding* v. *Smith* (6) were also referred to.]

Inderwick, in reply, referred to Story, Conflict of Laws, s. 183.

Cur. adv. vult.

Nov. 26. The judgment of the Court (James, Baggallay, and Cotton, L.JJ.), was delivered by

COTTON, L.J. This is an appeal from an order of the Court of Divorce, dated the 17th of March, 1877, dismissing a petition presented by Ignacia Sottomayor, praying the Court to declare

(1) 11 Cl. & F. 85.
(2) 9 H. L. C. 193.
(3) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97.
(4) 3 Hagg. 639.
(5) 2 Cl. & F. 488, 530.
(6) 2 Hagg. Cons. Rep. 371.

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SOTTOMAYOR v. DE BARROS.

her marriage with the respondent Gonzalo de Barros to be null and void. The respondent appeared to the petition, but did not file an answer or appear at the hearing; and by direction of the judge the Queen's proctor was served with the petition, and appeared by counsel to argue the case against the petition.

There were several grounds on which the petitioner originally claimed relief, but the only ground now to be considered is that she and the respondent were under a personal incapacity to contract marriage. The facts are these: The petitioner and respondent are Portuguese subjects, and are and have always been domiciled in that country, where they both now reside. They are first cousins, and it was proved that by the law of Portugal first cousins are incapable of contracting marriage by reason of consanguinity, and that any marriage between parties so related is by the law of Portugal held to be incestuous and therefore null and void; but though not proved, it was admitted before us that such a marriage would be valid if solemnized under the authority of a papal dispensation.

In the year 1858 the petitioner, her father and mother, and her uncle, De Barros, and his family, including the respondent, his eldest son, came to England, and the two families occupied a house jointly in Dorset Square, London. The petitioner's father came to this country for the benefit of his health, and De Barros for the education of his children and to superintend the sale of wine. De Barros subsequently, in 1861, became manager to a firm of wine merchants in London, carrying on business under the style of Caldos Brothers & Co., of which the petitioner's father was made a partner, and which stopped payment in 1865. On the 21st of June, 1866, the petitioner, at that time of the age of fourteen years and a half, and the respondent, of the age of sixteen years, were married at a registrar's office in London. No religious ceremony accompanied or followed the marriage, and although the parties lived together in the same house until the year 1872, they never slept together, and the marriage was never consummated. The petitioner stated that she went through the form of marriage contrary to her own inclination, by the persuasion of her uncle and mother, on the representation that it would be the means of preserving her father's Portuguese pro-

perty from the consequences of the bankruptcy of the wine business.

Under these circumstances the petitioner, in November, 1874, presented her petition for the object above mentioned, and Sir R. Phillimore, before whom the case was heard, declined to declare the marriage invalid and dismissed the petition, but did so, as we understand, rather because he felt himself bound by the decision in the case of *Simonin* v. *Mallac* (1), than because he considered that on principle the marriage ought to be held good. If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid. But it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised. In argument several passages in Story's Conflict of Laws were referred to, in support of the contention that in an English court a marriage between persons who by our law may lawfully intermarry ought not to be declared void, though declared incestuous by the law of the parties' domicile, unless the marriage is one which the general consent of Christendom stamps as incestuous. It is hardly possible to sup-

(1) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97.

1877

SOTTOMAYOR v. DE BARROS.

pose that the law of England, or of any Christian country, would consider as valid a marriage which the general consent of Christendom declared to be incestuous. Probably the true explanation of the passages in Story is given in *Brook* v. *Brook*, by Lord Cranworth (1), and by Lord Wensleydale (2), who express their opinions that he is referring to marriages not prohibited or declared to be incestuous by the municipal law of the country of domicile.

But it is said that the impediment imposed by the law of Portugal can be removed by a Papal dispensation, and, therefore, that it cannot be said there is a personal incapacity of the petitioner and respondent to contract marriage. The evidence is clear that by the law of Portugal the impediment to the marriage between the parties is such that, in the absence of Papal dispensation, the marriage would be by the law of that country void as incestuous. The statutes of the English parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous; but the law of Portugal does recognise the validity of such a dispensation, and it cannot in our opinion be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage is effected, or that the law of Portugal, which prohibits and declares incestuous, unless with such a dispensation, a marriage between the petitioner and respondent, does not impose on them a personal incapacity to contract marriage. It is proved that the courts of Portugal, where the petitioner and respondent are domiciled and resident, would hold the marriage void, as solemnised between parties incapable of marrying, and incestuous. How can the courts of this country hold the contrary, and, if appealed to, say the marriage is valid? It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicile of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take

(1) 9 H. L. C. at pp. 227, 228. (2) 9 H. L. C. at pp. 241, 242.

notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country.

The counsel for the petitioner relied on the case of *Brook* v. *Brook* (1) as a decision in his favour. If, in our opinion, that case had been a decision on the question arising on this petition, we should have thought it sufficient without more to refer to that case as decisive. The judgment in that case, however, only decided that the English Courts must hold invalid a marriage between two English subjects domiciled in this country, who were prohibited from intermarrying by an English statute, even though the marriage was solemnised during a temporary sojourn in a foreign country. It is, therefore, not decisive of the present case; but the reasons given by the Lords who delivered their opinions in that case strongly support the principle on which this judgment is based.

It only remains to consider the case of *Simonin* v. *Mallac.* (2) The objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage; and the decision in *Simonin* v. *Mallac* (2) does not, we think, govern the present case. We are of opinion that the judgment appealed from must be reversed, and a decree made declaring the marriage null and void.

Judgment reversed.

Solicitors for petitioner: *Tamplin, Taylor, & Joseph.*
Solicitor for respondent: *J. P. Poncione.*

(1) 9 H. L. C. 193. (2) 2 Sw. & Tr. 67; 29 L. J. (P. M. & A.) 97.

1878
Jan. 22.

[IN THE COURT OF APPEAL.]

THE CYBELE. (O. 519.)

Salvage—Her Majesty's Ships—Vessel belonging to Ramsgate Harbour—Board of Trade—Harbours and Passing Tolls Act, 1861 (24 & 25 *Vict. c.* 47), *Pt. vii.—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 484, 485.

4 P D 138
5 P D 202

Under the Harbours and Passing Tolls Act, 1861, the harbour of Ramsgate and the property and powers of its trustees were transferred to the Board of Trade. In a suit for salvage remuneration for services rendered by a vessel belonging to the harbour and vested in the Board of Trade under the provisions of the Act:—

Held affirming the decision of the Judge of the Admiralty Court, that the vessel was not a ship belonging to Her Majesty within the meaning of the Merchant Shipping Act, 1854, ss. 484, 485; and therefore that the Board of Trade were not precluded from recovering salvage in respect of its services, and that the claims of the commander and crew might be adjudicated upon without the consent of the Admiralty.

THIS was an appeal from a judgment of Sir R. Phillimore, the judge of the Admiralty Court. (1)

The action was brought by the owners, master, and crew of the *Ben Achie* against the steamship *Cybele* for salvage remuneration. The steamtug *Vulcan* and the lifeboat *Bradford*, both of which belonged to Ramsgate Harbour, assisted in saving the ship. The owners of the *Cybele* having appeared, the Board of Trade, as the owners of the *Vulcan* and the *Bradford*, were added to the suit, in order to have their claim for salvage services against the *Cybele* adjudicated.

The defendants demurred to the claim of the Board of Trade in respect of the *Vulcan* and *Bradford*, on the ground that it was contrary to the provisions of the Merchant Shipping Act, 1854.

The pleadings are given fully in the previous report. (1)

The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 484, enacts that "In cases where salvage services are rendered by any ship belonging to Her Majesty, or by the commander or crew thereof, no claim shall be made or allowed for any loss, damage,

(1) 2 P. D. 224.

or risk thereby caused to such ship, or to the stores, tackle, or furniture thereof, or for the use of any stores or other articles belonging to Her Majesty supplied in order to effect such services, or from any other expense or loss sustained by Her Majesty by reason of such services."

Section 485 provides that "No claim whatever on account of any salvage services rendered to any ship or cargo, or to any appurtenances of any ship, by the commander or crew or part of the crew of any of Her Majesty's ships shall be finally adjudicated upon unless the consent of the Admiralty has first been obtained, such consent to be signified by writing under the hand of the Secretary of the Admiralty."

By the Harbours and Passing Tolls Act, 1861 (24 & 25 Vict. c. 47), Pt. vii., s. 22, it is enacted that "The harbour of Ramsgate and the soil thereof, and all property, real and personal, vested in the trustees of the said harbour, or in any person in trust for the purposes of the said harbour, with their actual and reputed appurtenances, subject to all leases, contracts, charges, or other liabilities affecting the same, shall be transferred to and are hereby vested in the Board of Trade."

Sir R. Phillimore overruled the demurrer, being of opinion that the *Vulcan* and *Bradford* were not Her Majesty's ships within the meaning of the clause in the Merchant Shipping Act, and awarded 1200*l.* to the owners, officers, and crews of the *Vulcan* and the *Bradford*, without requiring any evidence of the consent of the Admiralty.

From this judgment the defendants appealed.

W. G. F. Phillimore (*Myburgh* with him), for the defendants, contended that the two vessels being vested in the Board of Trade for public purposes were Her Majesty's ships. He referred to *Cargo ex Woosung* (1), *The Thetis* (2), and to the Harbours and Passing Tolls Act, 1861, s. 28, which gives the Board of Trade a percentage on the salvage payable on any ship or wreck brought into Ramsgate Harbour.

Clarkson, and *Wood Hill*, for the plaintiffs, were not called on.

(1) 1 P. D. 260.

(2) 3 Hagg. Ad. 14, at p. 61.

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JAMES, L.J. I am clearly of opinion that these are not Queen's ships within the meaning of the Act. The Board of Trade merely took the harbour and the boats, like an ordinary corporation, using the harbour and the harbour boats, as an ordinary harbour corporation, for harbour purposes; and I really cannot see that the learned judge could have come to any other conclusion than the one at which he arrived. The appeal must, therefore, be dismissed with costs.

BAGGALLAY, L.J. I am of the same opinion. These are boats simply employed for commercial purposes—the steamtug and the lifeboat of the harbour—for performing the ordinary harbour services; they are not under the special control of Her Majesty, nor do they perform the services of the Queen's ships.

THESIGER, L.J. I am of the same opinion. It is unnecessary to give an exact definition of the term "Her Majesty's ships," though I agree with the other members of the Court in considering that the term is used in the ordinary and natural sense. It is not intended to include every case in which every department of Her Majesty's service thinks proper to use a vessel for that service.

Appeal dismissed.

Solicitors for defendants: *Pritchard & Sons.*

Solicitor for owners and crew of the *Vulcan* and *Bradford*: *The Solicitor for the Board of Trade.*

[IN THE COURT OF APPEAL.]

1878
Jan. 25.

THE PECKFORTON CASTLE.

Collision—Sailing Regulations—Articles 12 *and* 17*—Ships crossing—Ship overtaking.*

A ship and a barque were both on the port tack. The barque was the windward vessel, and had the wind three points free. The ship was close hauled, and when first sighted by the barque was approaching her on her lee beam:—

Held, affirming the decision of the Judge of the Admiralty Court that the ships were crossing each other, and that it was the duty of the barque, being the windward vessel, to get out of the way of the other.

The definition of an "overtaking ship" in *The Franconia* (2 P. D. 8) questioned.

THIS was an appeal from a judgment of Sir R. Phillimore, the judge of the Admiralty Court (1).

The action was brought by the owners of the German barque *August* against the owners of the ship *Peckforton Castle*, of Liverpool, to recover damages in respect of a collision which occurred between the two vessels on the 6th of July, 1877, in the channel, near the Lizard. There was a counter-claim by the owner of the *Peckforton Castle*, laying the blame of the collision on the *August*. There was some conflict of evidence as to the exact course of the ships and the direction of the wind, but, according to the view which the Court took of the evidence, when the ships approached each other, the *August* was heading about E.; and the *Peckforton Castle* was on her starboard beam, standing in a North Easterly direction, and the wind was about N.W. The *Peckforton Castle*, being the fastest sailer of the two, ran into the *August* on her starboard beam, about her main rigging. The facts are more fully stated in the judgment of the Court.

Under these circumstances the plaintiffs contended that the *Peckforton Castle* was an "overtaking" ship, within the meaning of the 17th article of the Sailing Regulations, and ought to have kept out of the way of the *August*; and the owners of the *Peckforton Castle* contended that the ships were "crossing," and that the case

(1) 2 P. D. 222.

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was covered by the 12th article (1); and as both ships had the wind on the same side, the *August*, being the windward ship, ought to have kept out of the way of the *Peckforton Castle*.

Sir R. Phillimore was of opinion that the *August* was to blame, and from that decision the plaintiffs appealed.

Jan. 21. *Milward, Q.C.* (*Clarkson* and *C. Hall* with him), for the plaintiffs. The result of the evidence is that when the two ships approached each other the *Peckforton Castle* was two or three points abaft the beam of the *August*, and was therefore an overtaking ship. The plaintiffs rely on the definition of an overtaking ship in *The Franconia* (2), where Brett, J.A., delivering the judgment of the Court of Appeal, said that when two ships are on the same course, and the hinder ship is in such a position that she cannot see either of the side lights of the forward ship, the hinder ship, if she is going faster than the other is an overtaking ship. That was the case in the present instance.

Butt, Q.C., and *Myburgh*, for the defendants. Considering the course of the two ships, and the direction of the wind, it was impossible for the *Peckforton Castle* to have overtaken the *August*, if she had been, when first sighted, two or three points abaft the beam of the *August*. The result of the evidence is that the two ships were crossing each other. Even if the *Peckforton Castle* was a little abaft of the *August* they were still crossing ships within the meaning of the 12th rule.

Milward, Q.C., in reply.

Cur. adv. vult.

Jan. 25, 1878. The judgment of the Court was delivered by BAGGALLAY, L.J. Shortly after noon on the 6th of July last

(1) The 12th article is as follows:— "When two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which the latter ship shall keep out of the way; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward."

(2) 2 P. D. at p. 12.

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the German barque *August* and the British ship *Peckforton Castle* came into collision in the English Channel near the Lizard.

The barque was passing up channel on a voyage from South Carolina to Bremerhaven, and the ship was proceeding in ballast from Rotterdam to Cardiff.

An action of collision was at once instituted by the owners of the *August* against the owners of the *Peckforton Castle*, which was met by a counter-claim of the latter; the action came on for trial, and on the 31st of the same month the judge of the Admiralty Court held that the *August* was alone to blame. From that decision the present appeal is brought. It is the common case of the plaintiffs and of the defendants that at the respective times when each vessel was first seen from the other, the *August* was on the port tack, heading E. or nearly so, and had the wind at least three points free; it is further agreed that for at least half an hour before the collision the *Peckforton Castle* was close hauled and on the port tack, but there is much conflict of evidence as to the direction of the wind and the consequent course of the *Peckforton Castle*, and also as to various other circumstances of the case. It was, however, admitted in the Admiralty Court, and has been admitted in the argument before us, that the real question at issue is whether the 12th or the 17th article of the Regulations for preventing collisions at sea is applicable to the circumstances of the present case.

The plaintiffs assert that the *Peckforton Castle* was first seen from the *August* about half-past eleven; that the wind was then, and continued until after the collision, to be from N. to N. by W.; that the *Peckforton Castle*, when so first seen, was three points on the starboard quarter of the *August*, distant about three miles, and heading between E.N.E. and N.E. by E., that is, at an angle of from two to three points from the course of the *August*, which was E.; that each vessel continued on her course until just before the collision, the speed of the *Peckforton Castle* being considerably in excess of that of the *August*; that under such circumstances the *Peckforton Castle* was an overtaking vessel, within the meaning of the 17th Article of the Regulations, and as such bound to keep out of the way of the *August*, but neglected to do so.

The defendants, on the other hand, insist that the wind was

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from N.W. to N.W. by N.; that the *Peckforton Castle*, which, during the forenoon had been on the starboard tack, heading W. by S., went on the port tack at 12 o'clock, and that thenceforth her course was between N.N.E. and N.E. by N., or inclined at an angle of from five to six points to that of the *August;* that the *August* was first seen from the *Peckforton Castle* about 12.15, being then four points on the port bow, and distant about a mile and a half; that, under such circumstances, the *August* and *Peckforton Castle* were crossing vessels, within the meaning of the 12th Article of the Regulations, and the *August* being to windward, was bound to keep out of the way, and not having done so was alone to blame.

The defendants further assert that at no time was the *Peckforton Castle* three points on the starboard quarter of the *August* as seen from that ship, and that if she had been so situate with the wind from N.W. to N.W. by N. a collision between the two vessels could not possibly have occurred if each had continued on her course. Having regard to the two views so put forward by the parties, we are of opinion that the question of fact, upon the solution of which the decision of this appeal must depend, is that of the direction of the wind; if this be ascertained, the course of the close hauled ship lying within six points of the wind can be readily determined. [His Lordship then shortly referred to the evidence adduced on both sides, and proceeded:—] We are satisfied upon this evidence that the wind, at and near the place where the collision occurred, was for some time previously to and for some time after the collision from N.W. to N.W. by N. as alleged by the defendants.

Now one effect of our having arrived at this conclusion as to the direction of the wind, in the face of the positive statement of so many witnesses who were on board the *August*, is to materially lessen the value which we might otherwise have been disposed to attach to their evidence upon other matters as to which there is a conflict of testimony, but in our opinion it is unnecessary to enter into any particular consideration of these other controverted matters.

It being established that the direction of the wind was from N.W. to N.W. by N., the course of the *Peckforton Castle* on her

port tack must have been, as alleged by the defendants, between N.N.E. and N.E. by N., inclined therefore at an angle of at least five points to that of the *August*, and it was utterly impossible for the *Peckforton Castle* to have been ever seen from the *August* three points on the starboard quarter of the latter, or indeed in any direction abaft her beam; the statement of the master of the *Peckforton Castle* appears to be substantially correct, that after he went about his ship was pretty broad on the starboard bow of the *August*.

The ship and the barque were consequently crossing vessels with the wind on the same side, and the barque being to windward was bound to keep out of the way; this she neglected to do, and we agree with the learned judge of the Admiralty Court in thinking that she was alone to blame. The gentlemen who have given us their assistance as nautical assessors concur in the views which we have expressed, but they are further of opinion that the *August* was guilty of a breach of the well recognized rule of navigation, that a ship having the wind free should give way to one close hauled, this view was probably taken by the judge of the Admiralty Court, and by the Elder Brethren who assisted him, but we prefer to base our decision against the plaintiffs upon the ground that they disobeyed the directions given in article 12.

The appeal must be dismissed with costs.

HIS LORDSHIP then added:—The judgment which I have just read is the judgment of the Court. I desire, however, to add a few observations with reference to that portion of Mr. Milward's argument which was based upon the judgment in the case of *The Franconia* (1).

Mr. Milward, in support of his contention that the *Peckforton Castle* was overtaking the *August*, and relying upon the evidence of his own witnesses, that she was three points on the starboard quarter of the latter, claimed the benefit of the definition of an overtaking vessel suggested by Lord Justice Brett in delivering the judgment in the case of *The Franconia*. (2) What Lord Justice Brett said was as follows: "Can we then form a definition

(1) 2 P. D. 8. (2) 2 P. D. at p. 12.

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of the difference between crossing ships and overtaking ships? It seems to me that this may be a very good definition—I will not say that it is exhaustive, or that it may not on some occasion be found to be short of comprising every case, but I think it is a very good rule—that if the ships are in such a position, and are on such courses, and at such distances, that if it were night the hinder ship could not see any part of the side lights of the forward ship, then they cannot be said to be crossing ships, although their courses may not be exactly parallel. It would not do, I think, to limit the angle of the crossing too much, but a limit to that extent, it seems to me, is a very useful and practical rule. And then if the hinder of the two ships is going faster than the other she is an overtaking ship."

In the *Franconia* case that vessel was two points on the quarter of the *Strathclyde*. Mr. Milward's argument was this:—If the *Peckforton Castle* was three points on the starboard quarter of the *August* she could not, had it been night, have seen any of the side lights of the *August*, and she was accordingly an overtaking vessel, and the 17th, and not the 12th article of the Regulations was applicable. This would have been a very effective, if not a conclusive, argument, if it had been established that the *Peckforton Castle* was three points on the starboard quarter of the *August*. But we have held that the *Peckforton Castle* was not three points on the starboard of the *August*, or in any direction abaft her beam, and the question whether the definition is accurate or not is not of importance in the present case.

I desire, however, to state that, without expressing any dissent from the definition, which I am bound to say I at the time thought satisfactory, it was not in my opinion necessary for the decision of the *Franconia* case. I am unwilling to be considered as giving it an unqualified assent. The arguments in the present case have caused me to entertain some doubt upon the subject, and I desire to reserve to myself the right of reconsidering it when the circumstances of any case before us may require it.

It is occasionally a matter of considerable difficulty to decide whether a particular vessel is crossing, overtaking, or approaching another, within the intent and meaning of the several Articles of the Regulations, and the Court whose duty it is to decide such

questions must act upon the view taken by it of the circumstances of the case under consideration, and with a due regard to the usual matters provided for by the 19th article, as well as to those recognised rules of navigation which, though not expressed, or not fully expressed, are nevertheless of general application.

JAMES, L.J. I also desire to add that the result of the argument induces me to come to the conclusion that I doubt whether the definition laid down in *The Franconia* (1) can be laid down as a rule to be so generally applicable as appears to have been intimated in that case.

THESIGER, L.J. With regard to the definition referred to, after what has fallen from the other members of the Court, I have only to add that I am not prepared in a case like the present to express the opinion that that definition ought not to be adopted as a convenient rule of navigation. I only desire to reserve my assent to it until the occasion arises when it will have to be considered more fully whether the test given by it can be in all cases equally applied.

Appeal dismissed.

Solicitor for plaintiffs: *T. Cooper.*
Solicitors for defendants: *Gregory, Rowcliffes, & Rawle.*

(1) 2 P. D. at p. 12.

1877
Nov. 13.

THE ENGLISHMAN. (O. 180.)

Collision—Regulations for Preventing Collisions at Sea, Art. 9—*Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.

A French trawler and a schooner came into collision in the English Channel in the morning before sunrise. The trawler was proceeding at a speed of from two to three knots an hour. She had her trawl on deck and was about to let it go. A white light was exhibited at her masthead, but no side lights were exhibited. At the hearing of an action of damage to recover for the damages sustained in the collision, the Court found that the collision was caused by the absence of any look-out on board the schooner.

It was then submitted that the trawler had infringed the Regulations for Preventing Collisions at Sea by not exhibiting the regulation side-lights, and by reason of such infringement was in fault, within the meaning of the 17th section of the Merchant Shipping Act Amendment Act, 1873:—

Held, that the trawler had infringed the Regulations by not exhibiting the Regulation side-lights:

Held, also, that, as in the absence of a look-out on the part of the schooner, the neglect of the trawler to observe the regulations as to lights could not by any possibility have contributed to the collision, the section had no application, and the schooner was alone to blame for the collision.

THIS was an action of collision instituted on behalf of the French fishing smack *L'Étoile* against the schooner *Englishman* and her owners defendants intervening. The action was brought to recover damages in respect of a collision which occurred between the two vessels before sunrise on the morning of the 27th of November in last year, south of the Kentish Knock light-ship.

The statement of claim alleged that at daybreak the *L'Étoile*, a lugger of 42 tons register, was sailing close-hauled on the port tack, proceeding slowly through the water with a bright light exhibited at her masthead, and that those on board her were just about to let out their trawl-net when the *Englishman* was seen about a mile distant on the port-bow, and that although a flare-up was burnt and a light shewn on board the *L'Etoile* the two vessels came into collision, the stem of the *Englishman* striking the *L'Étoile* nearly amidships on the port-side.

The defendants in their statement of defence and counter-claim alleged that before sunrise on the day of the collision the *Englishman* was heading north-east on the starboard tack with the Regulation side-lights burning and a good look-out kept; that in these

circumstances the *L'Étoile* was for the first time observed under the bows of the *Englishman*, and immediately afterwards the collision occurred; and that the *L'Étoile* had no lights except a hand or binnacle-light inclosed in something like a box on deck, and had not her side-lights fixed and burning as required by law.

By way of counter-claim the defendants repeated the allegations before set out in the statement of defence and counter-claim, and alleged that the *Englishman* had been damaged in the collision.

The plaintiffs in their reply admitted that the *L'Étoile* had no side-lights burning.

Nov. 12. The action was heard before the judge and two of the Elder Brethren of the Trinity Corporation.

Witnesses were examined orally in court on behalf of the plaintiffs and the defendants. It was proved in evidence that at the time of the collision the *L'Étoile* was proceeding at a speed of from two to three knots an hour, and that her trawl net was on her deck, and some of her crew were getting it ready to be lowered into the water. The result of the evidence on the other portions of the case appears from the judgment. After hearing the evidence the Court intimated its opinion that the collision had been caused by the absence of a look-out on board the *Englishman*.

The question whether the *L'Étoile* was not also to blame under the provisions of the 17th section of the Merchant Shipping Act, 1873, was then argued.

Milward, Q.C., and *E. C. Clarkson*, for the plaintiffs.

Butt, Q.C., and *W. G. F. Phillimore*, for the defendants. The *L'Étoile* at the time of the collision was not stationary or attached to her nets within the meaning of the 9th Article of the Regulations for Preventing Collisions at Sea: *The Esk* (1); *The Jennie S. Barker*. (2) She was, therefore, just as any other sailing vessel of her size in motion bound to exhibit the fixed Regulation side-lights, and not having done so she must be deemed in fault under the provisions of 36 & 37 Vict. c. 85, s. 17. Even though a white light was shewn as pleaded by the *L'Étoile* and not seen by the look-out on board the *Englishman*, it by no means follows that the

(1) Law Rep. 2 Ad. & E. 350. (2) Law Rep. 4 Ad. & E. 456.

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port side-light of the *L'Étoile* would have escaped being noticed. Consequently the omission to exhibit such light might possibly have contributed to the collision; and this being the case, the *L'Étoile*, under the provisions of the section must be held liable for a moiety of the damage arising out of the collision: *The Fanny M. Carvill.* (1)

Clarkson, in reply. The 17th section of 36 & 37 Vict. c. 85, can only apply where the neglect to observe the Regulations for Preventing Collisions could in the special circumstances of the case before the Court have by any possibility contributed to the collision. On the evidence in the present case the white light of the *L'Étoile* was not seen from the *Englishman*, it is reasonable therefore to conclude that the side-lights of the *L'Étoile* if exhibited would not have been seen. How, then, can the neglect to exhibit such lights by any possibility have contributed to the collision?

Cur. adv. vult.

Nov. 13. SIR ROBERT PHILLIMORE. This is a case arising out of a collision between a small French fishing lugger called the *L'Étoile*, of 42 tons register, and a three-masted schooner called the *Englishman*, of 183 tons register. The exact time of the collision is a matter of dispute. On the one hand, on behalf of the *L'Étoile*, it is stated to have been about seven o'clock in the morning, and on the part of the *Englishman*, to have been at about half-past five in the morning. The evidence is conflicting in this as in other cases, and the right time would be somewhere between these two periods. The collision took place, at all events, on the morning of the 27th of November, in last year, nine or ten miles distant from the Kentish Knock. The direction of the wind is undisputed, it being S.S.W. The weather is stated on the part of the *L'Étoile* to have been clear, and to have been overcast but clear in the statement on the part of the *Englishman*. The *L'Étoile* was close hauled on the port tack, heading to the westward, and was getting her trawl out. At this time she was proceeding, as it appears on the evidence, at a speed of from two to three knots an hour. Her trawl net was on the deck, and was being attended to

(1) 44 L. J. (Adm.) 34.

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by a portion of the crew, who were getting it ready. The master of the *L'Étoile* ordered her side lights to be taken in and a globular white light to be exhibited at the masthead. There were also, as it appears from the evidence, two small white lights used by the crew on deck while they were getting the net ready. Those on board the *L'Étoile* saw the lights of the *Englishman* a mile off on their weather bow, and then they shewed one or two white lights and a flare-up, but no heed was taken by the English vessel, which ran into the French vessel and struck her port side amidships. There is no question that the latter was not seen or heard of before the time of the collision. The preliminary act, filed on behalf of the defendants, says the *L'Étoile* was first seen under the bows of the *Englishman*. According to the evidence she was neither seen nor heard of until the jibboom of the *Englishman* had run between the masts of the *L'Étoile*. The *Englishman* appears to have had the wind on her starboard quarter. Now, there has been a great discussion on a very important subject, namely, whether the *Englishman* had or had not a proper look-out, and of course it was her duty, having the wind free, to get out of the way of the French vessel. I considered this matter, and the various other parts of the case, with the Elder Brethren, and we arrived at the clear conclusion that the fair result of the evidence, taking into consideration all the circumstances, and the demeanour of the witnesses, was that there was the want of a look-out on board the *Englishman*. Nor, indeed, was it stoutly contended, nor could it be that that was not the case. The question remains to be decided with respect to the liability of the French vessel for disobedience to the Regulations for Preventing Collisions at Sea, and that leads to the consideration of the 17th section of the Merchant Shipping Act, 1873, which enacts as follows:—

> If in any case of collision it is proved to the Court before which the case is tried that any of the Regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873, has been infringed, the ship by which such Regulations has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the Regulation necessary.

Now the Regulations respecting the lights to be carried by

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vessels fishing with trawl nets are to be found in the 9th Article of the Regulations for Preventing Collisions at Sea, which provides that "open fishing boats and other open boats shall not be required to carry the side lights required for other vessels;". . . The *L'Étoile* was not an open fishing boat, but a decked boat. The next clause of the same 9th article is as follows:—"Fishing vessels and open boats, when at anchor, or attached to their nets and stationary, shall exhibit a bright white light." It is therefore clear that, unless this vessel was attached to her net and stationary, it was not her duty to exhibit a white light, but that it was her duty to exhibit the Regulation side lights. We have no doubt, upon this part of the case, that the vessel was not attached to her net, and was not stationary. It was said that, as she was just preparing to put down her net, it would be too harsh a construction of the rule to consider her not to be stationary. I think the principle laid down by me in the case of *The Esk* (1), in the analogous instance of one vessel having an anchor overboard, but not holding, applies in this case. In that case I said as follows:—

> The object of the Regulations, so far as their bearing on the present case is concerned, with respect to carrying lights, is to furnish the means of apprising other vessels whether the vessel carrying them be stationary or in motion, in order that the coming or meeting vessel may direct her course in consequence, and give the vessel carrying coloured lights and in motion a wider berth than she would give if that vessel carried an anchor light and was stationary. This is the principle which underlies these rules; it is possible, no doubt, to draw fine distinctions between vessels which have just actually raised their anchor off the ground and those which are in the very act of doing so; but practically the true criterion as to the application of the Regulation must be, whether the vessel be actually holden by and under the control of her anchor or not. The moment she ceases to be so, she is in the category of a vessel under way, and must carry the appointed coloured lights.

I am of opinion that the principle of that decision applies to the present case, and that the rule of navigation to which I have referred has been infringed by the French vessel on this occcasion. It remains to be considered what is the legal result of this infringement; it being, in our judgment, clearly proved that the collision in this case was caused, as I have said, by the want of a look-out on the part of the *Englishman*. The clause of the statute I have read has been the subject of very careful judicial consideration,

(1) Law Rep. 2 Ad. & E. 350.

both in this court and on appeal to the Judicial Committee of the Privy Council, which affirmed the judgment which I delivered in the case of *The Fanny M. Carvill.* (1) There is no doubt that there is a difficulty in applying the principle laid down in the judgment in that case to all the cases coming before the Court, but, as I infer from the language of the judgment, the true principle to be applied is this, that the party guilty of an infringement of the regulations has the burthen cast upon him of shewing that the infringement could not possibly have contributed to the collision. Therefore in this case, I have to consider, looking to all the circumstances of the case, whether the absence of the side lights of the *L'Étoile* could have possibly contributed to the collision. In the present case there was the want of a look-out. The French vessel had a white light visible a mile distant at least; she had a flare-up shewn, and neither white light or flare was seen, and indeed those on board the English vessel knew nothing of the approach of the French vessel until the shock of the collision. On this point it is not immaterial to observe that the blow was upon the weather bow. The question would then arise, did the absence of the red light of the *L'Étoile* contribute to the collision? After much consideration we think that it did not; that the collision was the consequence of no look-out on board the *Englishman*, and that the side lights of the *L'Étoile* would have been unseen as much as the masthead light. The absence of lights, in our judgment, could not have contributed to the collision; therefore the 17th section of the Merchant Shipping Act, 1873, does not apply, and the English vessel is alone liable for the damage which in our opinion was unquestionably caused by the want of a look-out on board that vessel.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Shephard & Skipwith.*

(1) 44 L. J. (Adm.) 34.

1877
Nov. 16.

THE SKIBLADNER. (S. 502. Liv.)

Salvage—Services Rendered by putting Hands on board Vessel Infected with Yellow Fever—Amount of Award.

Two Norwegian barques, both bound to England, fell in with each other on the high seas, about 3000 miles from Liverpool; one of the barques was in distress, her first mate having died, and her master, her second mate, and one of the crew being sick with yellow fever. The other barque was short-handed, but her mate, with the consent of her master, went on board the distressed vessel and succeeded in navigating her to Liverpool. During the voyage, the master, the second mate, and two of the crew died. On the arrival of the vessel at Liverpool an action of salvage was instituted against her. At the hearing of the action, the value of the salved property was taken at 5135*l.* 13*s.* 2*d.*

The Court awarded 600*l.* to the mate who had gone on board the distressed vessel, 100*l.* to the owners of the salving vessel, 50*l.* to her master, and 150*l.* amongst the remaining plaintiffs.

This was an action of salvage, instituted on the 16th of October, 1877, on behalf of the owners, master, and crew of the Norwegian barque *Hirundo*, against the Norwegian barque *Skibladner*, her cargo and freight.

The statement of claim, so far as material, was in substance as follows:—

The *Hirundo* is a barque belonging to Porsgrund in Norway, of 332 tons register. She left Tonala in Mexico in the month of August, 1877, with a cargo for Queenstown for orders. She had a crew of eight hands all told, her usual complement being nine, but one having deserted.

About 10 A.M. of the 26th of August, being in latitude 36° N. and longitude 70° W., those on board the *Hirundo* saw the *Skibladner*. The *Skibladner* is also a Norwegian barque of about 360 tons register, and was bound from Fernandina in Florida to Liverpool.

The master of the *Hirundo* went in his boat on board the *Skibladner*, and there learnt that the first and second mates and the master's wife were sick with yellow fever, and that the master was so weak that he had not been able to write up the log or take an observation since he left port. The said master asked the master of the *Hirundo* to keep company with him till the afternoon, and take an observation for him.

An observation was accordingly taken, and the longitude was chalked up on a black board and put over the side of the *Hirundo*, but the *Hirundo* lost sight of the *Skibladner*.

About 8 A.M. of the 1st of September, being in latitude 37° 53′ N., longitude 68° 54′ W., those on board the *Hirundo* saw a vessel about four miles ahead, laying to, with all sails set and shaking, her main topsail aback, and two Norwegian

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flags hoisted upside down and tied in the middle with string as signals of distress, one at her mainmast head and the other at the gaff peak. The wind was light, and the *Hirundo* steered towards the vessel, and when she was recognised as the *Skibladner*, lay to. A boat was then sent from the *Skibladner* to the *Hirundo*, manned by two men.

The steward of the *Skibladner*, who was one of the two men in the boat, before coming on board asked permission from the master of the *Hirundo* to do so, after warning him that the fever which had broken out was worse. When they came on board the boat's crew stated that the master's wife had died in the night when they had parted company, and that the first mate had died on the 28th of August, that the second mate and one seaman were very ill with the fever, that the master was very sick, and they had no one to navigate, and were unable to navigate the *Skibladner*, but were by the master's orders keeping her in an easterly course, and they asked that some one might be sent to navigate her. The master of the *Hirundo* said that he was short-handed, and could not spare a navigator, as he had only one besides himself, but he offered to go on board to see the captain.

The master of the *Hirundo* accordingly went on board the *Skibladner*, and saw her master, and was by him asked to send some one to navigate the *Skibladner*, and the master of the *Hirundo* thereupon returned to his vessel and requested Osman Osmandsen, the only mate of the *Hirundo*, to take charge of and navigate the *Skibladner*. The said mate was the only person in the *Hirundo* who besides her master could navigate a ship. The master was seriously ruptured, and was also under apprehension that he might have caught the infection from having been on board the *Skibladner*, and the *Hirundo* was already short-handed. For all these reasons, both the master and the said Osman Osmandsen were unwilling that the latter should leave the *Hirundo*, but, for the sake of saving the lives of those on board the *Skibladner* and the *Skibladner* herself, it was arranged that the said Osman Osmandsen should go.

The said Osman Osmandsen, accompanied by the master of the *Hirundo*, accordingly went on board the *Skibladner*. They found the master of that vessel very ill of yellow fever, and the said Osman Osmandsen was requested by the said master of the *Skibladner* to stay on board and navigate the ship to England, on the ground that he, the said master of the *Skibladner*, was so ill that he did not expect to recover. On the said Osman Osmandsen promising to do so, the master said that he could lie down in peace. The *Skibladner* had then nine hands on board all told out of her original complement of ten, but of these the master, second mate, and one seaman were ill with the fever, and unable to work. There was also a passenger on board—a landsman—who was also ill.

The master of the *Hirundo*, who came on board with the said Osman Osmandsen, instructed him as to the medicines to be given to the sick, and went away, promising to keep the *Hirundo* ahead and show a light, and to speak the *Skibladner* next morning. This was done. The *Hirundo* then sailed away, and was lost sight of.

The said Osman Osmandsen steered the *Skibladner* a course for Liverpool, taking one watch, and the said steward the other. The said Osman Osmandsen regularly visited the sick men, and administered to them the medicines which had been recommended.

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On the 5th of September the second mate of the *Skibladner* died. On the 6th her master and the sick seaman died, and on the same day the said Osman Osmandsen was taken seriously ill. The next day he was delirious and unable to leave his berth. The third day he recovered sufficiently to be able to do duty, though still requiring medicine for some days.

The weather had been fine up to the 11th of September, but on that day the wind increased, and as the *Skibladner* was so short-handed, the fore and main top-gallant sails were split by the violence of the wind before they could be stowed. During all the time the said Osman Osmandsen had, in addition to his duties as commander and officer, to work as an ordinary seaman. The said passenger was not able to render any assistance.

On the 14th an able seaman, who had been with the steward in the boat, was taken ill with the fever, and on the 17th he died.

On the 11th of October the *Skibladner* arrived off the Great Ormeshead, and was taken in tow by a tug. On the same day a Liverpool pilot came on board, and the *Skibladner* was anchored in the Mersey.

The defendants tendered by act in court 515*l.* as sufficient salvage remuneration for the plaintiffs' services, and submitted to the judgment of the Court on the allegations in the statement of claim.

Nov. 16. The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity Corporation.

It was agreed that the value of the *Skibladner* should be taken at 2500*l.*, and the value of her freight and cargo at 2635*l.* 13*s.* 2*d.*

W. G. F. Phillimore and *Barnes*, for the plaintiffs, referred to *The Active*. (1)

E. C. Clarkson, for the defendants. In awarding salvage remuneration in this case the Court ought not to lose sight of the circumstance that the services of Osman Osmandsen were rendered entirely in cold latitudes, and that, therefore, he actually ran little or no danger of infection from the yellow fever on board the *Skibladner*.

SIR ROBERT PHILLIMORE. This is, in the judgment of the Court, a case of most meritorious salvage. It is impossible to praise too highly the gallantry of this man Osman Osmandsen, or to doubt that the preservation of the lives of those on board the

(1) 14 Jur. 606.

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Skibladner was due to his courage and skill. The navigation of this vessel to Liverpool, a distance of about 3000 miles, took more than forty days. However, it is unnecessary to go over the facts of the case in detail. It is enough to state that the case is one of extraordinary merit. The danger from infection from the yellow fever that had attacked the ship was, in my opinion, by no means over when Osman Osmandsen went on board, and indeed it has been pointed out to me by the Elder Brethren that if the vessel had been in port she would still have been detained in quarantine some days. Looking at all the circumstances, I have to consider whether, the value of the property salved being 5135*l.*, the tender of 515*l.* is a sufficient salvage remuneration for the services rendered. Now, I am of opinion that it is not, and I shall award 900*l.* The great service in this case no doubt was rendered by Osman Osmandsen, and I shall award to him 600*l.* The master of the *Hirundo* parted with one of his navigators, and he was in very bad health himself. In these circumstances, the consequences of assisting the *Skibladner* as he did might have been serious to his own vessel. Taking all this into consideration, I shall award 100*l.* to the owners of the *Hirundo*, and 50*l.* to her master, which will leave 150*l.* to be divided among the crew, according to their rating.

Solicitors for plaintiffs: *Bateson & Co.*
Solicitors for defendants: *Stone & Fletcher.*

1877
Nov. 27.

THE CARGO EX SARPEDON (O. 435.)

Salvage—Contribution—Rules of Supreme Court, Order XVI., Rule 18—*Non-liability of Shipowners for Life Salvage in cases where no Property belonging to them has been Salved.*

6 P D 63

The C., a Spanish steamship, fell in at sea with the S., an English steamship, with signals of distress flying and entirely helpless from injuries sustained in a collision with a third vessel. The passengers of the S. and a quantity of specie, which had formed part of the cargo of the S., having been taken on board the C., attempts were made by the master and crew of the C. to tow the S. into safety. These attempts were ineffectual, and ultimately, after the master and crew of the S. had gone on board the C. the S. was abandoned, and her passengers, master, and crew were landed in safety at an English port. Afterwards the specie was arrested in an action of salvage instituted at the suit of the owners, master, and crew of the C., who claimed in the action to recover for life salvage and for salvage services rendered to the S. and the specie. The owners of the specie appeared as defendants, and served a notice on the owners of the S. calling upon them to contribute to the remuneration claimed by the plaintiffs. Thereupon the owners of the S. appeared. At the hearing of the action the Court awarded salvage remuneration to the plaintiffs for the services rendered, but reserved all questions as to the liability of the owners of the S. The owners of the specie then moved the Court to declare that such portion of the sum awarded as was awarded for life salvage ought to be recouped to the owners of the specie.

The Court refused the motion on the ground that no property belonging to the owners of the S. having been salved they could not be held personally liable to pay any portion of the sum awarded.

THIS was an action of salvage instituted on the 17th of October, 1876, on behalf of the owners, master, and crew of the *Calderon*, a Spanish steamship, against specie forming part of the cargo of the English steamship *Sarpedon*. The owners of the specie appeared as defendants, and the plaintiffs delivered a statement of claim, which set forth inter alia the following facts:—

The *Calderon*, bound on a voyage from Lisbon to London, at daylight on the 4th of September, 1875, and about eighty-five miles south-west of Ushant, came in sight of the *Sarpedon*, an iron steamship of about 1556 net tons register. The *Sarpedon*, which was manned by a crew of seventy-three hands, all told, and had on board her fifteen passengers and eight boxes of specie, in addition to other cargo, had been in collision with another steamer called the *Julia David*, and had received such injuries in the collision that her passengers and crew, expecting her to sink at once, had left her and taken to such of her boats as were available. Signals of distress were hoisted on board the *Sarpedon*, and the *Calderon* took on board the passengers and specie, together with a number of letters from the

Sarpedon, and the master of the *Sarpedon* requested the *Calderon* to take the *Sarpedon* in tow. Two hawsers were passed from the *Sarpedon* to the *Calderon* and were made fast on board the *Calderon*, and the *Calderon* endeavoured to tow the *Sarpedon* but the *Sarpedon* having become unmanageable, the hawsers had to be cut to prevent a collision with the *Calderon*. Another attempt was afterwards made to tow the *Sarpedon*, but after the hawsers had been made fast a second time between the two vessels it became necessary again to cut them, and ultimately, after about six hours had been spent in fruitless efforts to tow the *Sarpedon*, the crew of the *Sarpedon* were taken on board the *Calderon*, and the *Sarpedon* was abandoned with her engine-room full of water and four feet of water in her after hold, about seventy miles to the south-west of Ushant. The *Calderon* then proceeded to Falmouth, and there landed the passengers, master, and crew of the *Sarpedon*.

The defendants, in their statement of defence, admitted that the facts stated in the statement of claim were substantially true, and alleged that the value of the specie saved was 28,000*l*.

On the 16th day of January, 1877, the action came on to be heard, and the judge, after hearing counsel for the plaintiffs and the defendants, directed the hearing to be adjourned, and on the 19th of January the defendants applied to the Court by motion and obtained leave to issue a notice addressed to the owners of the *Sarpedon* pursuant to Order XVI., Rule 18, of the Rules of the Supreme Court, 1875. Accordingly, the owners of the specie served on the owners of the *Sarpedon* a notice alleging, inter alia, that the action had been brought by the plaintiffs against certain specie forming part of the cargo of the *Sarpedon* and the owners of the specie, to recover remuneration for services rendered by the said plaintiffs on the high seas to the steamship *Sarpedon*, to the said specie, and to the master, crew, and passengers of the *Sarpedon*, at the request and by the direction of the master of the *Sarpedon;* that the defendants claimed against the owners of the *Sarpedon* that they should contribute to the remuneration so claimed by the plaintiffs, and that the question of such remuneration should be determined between the plaintiffs, the owners of the specie, and the owners of the *Sarpedon;* and that if the owners of the *Sarpedon* wished to dispute their obligation to contribute to the amount of remuneration claimed by the plaintiffs, they must appear in the action. (1)

(1) The notice further alleged that the owners of the specie claimed to be indemnified by the owners of the *Sarpedon* against the claim of the plaintiffs in the action, on the ground that the collision with the *Julia David* had

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On the 5th of February, the owners of the *Sarpedon* appeared in the action, and on the 12th of February the Court ordered that the notice served upon them by the owners of the specie should be treated as a pleading.

The owners of the *Sarpedon* on the 2nd of March filed an answer, which alleged inter alia substantially as follows:—

The services of the plaintiffs were rendered by the plaintiffs under an agreement made by the master of the *Sarpedon*, as agent for the owners of the *Sarpedon* and the owners of her cargo, whereby the master of the *Sarpedon* employed the plaintiffs to render salvage assistance to the *Sarpedon*, her cargo, master, and crew, upon the terms that the plaintiffs were to be paid salvage for these services if and so far as their services should prove successful, and that the owners of the *Sarpedon* were not to be liable in respect of any of the plaintiffs' services, whether for life salvage, or otherwise, unless the services of the plaintiffs should prove successful in saving the *Sarpedon* or some part thereof. The services of the plaintiffs were not successful in saving the *Sarpedon* or any part thereof, but the *Sarpedon* and all her cargo, except the specie saved, was wholly lost.

The owners of the *Sarpedon* are not liable to the plaintiffs for any salvage in respect of any services rendered to the *Sarpedon*, or her cargo, or in saving the lives of the master and crew of the *Sarpedon*, and the said specie alone having been saved, such specie and its owners are alone liable for saving the lives of the master and crew of the *Sarpedon*. The owners of the *Sarpedon* deny liability to contribute to the remuneration claimed by the plaintiffs.

The plaintiffs and the owners of the specie filed separate replies to the answer of the owners of the *Sarpedon*, and in such replies joined issue on so much of such answer as is above set out.

May 5. The issues raised on the original pleadings of the plaintiffs and the owners of the specie again came on to be heard, together with the issues raised on so much of the answer of the owners of the *Sarpedon* as is above set out.

On the case being called on, it was with the consent of the Court agreed between the counsel for the different parties to the action that the question of the liability of the owners of the *Sarpedon* to pay or contribute towards the payment of the plaintiffs' costs, and whatever sum the Court should award as salvage remuneration in the action, should be reserved until the Court of

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been caused by the improper navigation of the *Sarpedon*. Owing, however, to the Court of Appeal having decided that the *Julia David* was alone to blame for the collision, the question of the right of the owners of the specie to be indemnified never came before the Court.

Appeal had given its decision in an appeal from this Court in an action of damage entitled *The Julia David* (O. 408), which action had been instituted on behalf of the owners of the *Sarpedon* against the *Julia David* for the recovery of the damages sustained by the *Sarpedon* in the collision referred to in the statement of claim.

Cohen, Q.C., and *G. Bruce*, for the plaintiffs.

Butt, Q.C., and *W. G. F. Phillimore*, for the owners of the specie.

E. C. Clarkson, for the owners of the *Sarpedon*.

SIR ROBERT PHILLIMORE. The facts of this very meritorious case of salvage are admitted, and are not the subject of controversy. It has been agreed, after a great deal of discussion, that the only questions which it is incumbent on the Court to day to decide are, what amount of salvage remuneration shall be paid in consequence of the saving of life, and the saving of the specie, and also whether any, and what amount of salvage remuneration shall be awarded on the ground of a separate engagement ineffectual, but still performed to the utmost efforts of the salvors to save the ship herself considered apart from the specie, and the lives of the passengers, master, and crew of the *Sarpedon*.

It has also been agreed that the question as to the contribution which it is contended should be made by the owners of the *Sarpedon* to the owners of the specie shall stand over until the decision of the Court of Appeal, on the merits of the collision between the *Sarpedon* and the *Julia David* be arrived at. I have already said that this is a case of very meritorious salvage, eighty-eight lives and 28,000*l.* of specie were saved at the risk of the lives of the persons who rendered the services in question. The Spanish vessel which rendered these services to the English vessel was a very costly instrument—if I may use such an expression—for she and her cargo were worth 53,000*l.* She went out of her way considerably, almost two days' steaming, to take these English people whose lives had been so saved into an English port, and it would be difficult, I think, to describe a service with more ingredients of merit than there are in this case. I have no doubt whatever that but for the succour which the *Calderon* afforded,

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those eighty-eight lives and 28,000*l.* worth of specie would have been lost.

I shall make an award of 4000*l.* as the salvage remuneration for these services, and I am of opinion that it would be, in the circumstances of this case, drawing too fine a line to attempt to establish a distinction between saving the specie and the lives, and the services rendered to the ship, and I shall, therefore, not make any separate award of salvage remuneration for the engagement, as it has been called, which was ineffectual, to save the ship herself.

The question of contribution will stand over, as I have already said, until the Court of Appeal has given its decision as to the merits of the collision with the *Julia David*. The apportionment of the award, which the Court has just made, between the owners, master, and crew of the *Calderon* will also stand over. (1)

On the 7th of August, the Court of Appeal delivered judgment in the action of damage which had been instituted by the owners of the *Sarpedon* against the *Julia David*, and pronounced that the *Julia David* was alone to blame for the collision between her and the *Sarpedon*.

Nov. 13. *W. G. F. Phillimore*, on behalf of the owners of the specie, moved the judge in Court to determine how much of the sum awarded for salvage to the plaintiffs, and subsequently paid to them by the owners of the specie, was for life salvage, and how much for salvage of specie, and to declare that the sum awarded for life salvage ought to have been paid to the plaintiffs by the owners of the *Sarpedon*, and further to order the owners of the *Sarpedon* to recoup to the owners of the specie the sum paid by them in respect of life salvage and costs to the plaintiffs.—He stated that the owners of the specie had paid to the plaintiffs the whole amount awarded for salvage remuneration, and the plaintiffs' costs in the action, and contended that on the admitted facts of the case the services of the plaintiffs in saving the lives of the passengers, master, and crew of the *Sarpedon* were rendered under a salvage agreement,

(1) On the 29th of May, the Court apportioned the 4000*l.* awarded to the plaintiffs, as follows: To the owners of the *Calderon* 3000*l.*, to the master of the *Calderon* 250*l.*, and to the officers and crew of the same vessel 750*l.*, to be divided among them according to their respective ratings on board thereof.

which, if not expressly made with the master of the *Sarpedon*, must be implied from the *Sarpedon* having hoisted signals of distress, and that consequently, as the owners of the *Sarpedon* were liable in personam, under such salvage agreement, it would be clearly inequitable if the amount of life salvage remuneration in the case should be entirely borne by the owners of the specie: *The Medina.* (1)

E. C. Clarkson, for the owners of the *Sarpedon*, opposed the motion. He referred to 17 & 18 Vict. c. 104, s. 458, and *The Cargo ex Schiller.* (2)

Cur. adv. vult.

Nov. 20. SIR ROBERT PHILLIMORE. The Court has already awarded the amount of salvage remuneration due in this case, namely, 4000*l.* upon 28,000*l.* of specie, being part of the cargo belonging to the *Sarpedon.* The *Sarpedon* herself was abandoned at sea in a sinking condition, and has not been recovered, but eighty-eight persons were taken from on board of her and saved by the *Calderon*, a Spanish vessel. It may be observed, in passing, that these persons were "persons belonging to" the lost ship, on the construction put on the 458th section of the Merchant Shipping Act, 1854, by the Judicial Committee of the Privy Council in the case of *The Fusilier.* (3) The owners of the specie have cited the owners of the *Sarpedon*, the lost vessel, and now call upon them to contribute to the payment of the 4000*l.* awarded by the Court. It was first contended on behalf of the owners of the specie that the master of the *Sarpedon* had expressly contracted with the master of the *Calderon* to save the lives in question. I am of opinion that this contention is not in accordance with the facts of the case.

Secondly, it was contended that the master of the *Sarpedon* was bound to contract, and did contract by implication, with the master of the *Calderon* for the saving of these lives. In support of this proposition the case of *The Medina* (1) was cited.

The circumstances of that case were very peculiar. The captain of the ship which had gone to pieces contracted, on behalf of 550

(1) 1 P. D. 272; 2 P. D. 5. (2) 1 P. D. 473; 2 P. D. 145.
(3) B. & L. 341.

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pilgrims who were left on a rock, just six feet above the water, to take them off for the sum of 4000*l.* The case was transferred to this Court from the Exchequer Division of the High Court of Justice. I considered the contract to be a salvage contract, and reduced the amount to 1800*l.*, on the ground of the unreasonableness of the amount extorted, as I thought it to be, by intimidation. That case cannot, in my opinion, be considered as supporting the demand of the owners of specie in the case before me. I consider it to be now a fixed principle of salvage law that, in the absence of any special contract, some property in the ship or cargo must be saved in order to found the liability of the owners of the ship or cargo to the payment of salvage remuneration. It has been pertinently asked in this case:—If the specie as well as the ship had been entirely lost, would the owners of the lost specie have been liable to contribute to the salvage to which, it is argued, the owners of the lost ship are liable? The principle was much discussed in the case of *The Fusilier* (1), already adverted to, but the case of *The Cargo ex Schiller* (2) appears to me to have a direct bearing upon the question now before me. In that case the *Schiller* had been lost, but specie to a large amount, part of her cargo, had been recovered by divers. I considered the cargo was liable to pay salvage remuneration, and made an award of 500*l.* The sentence was appealed from, and affirmed by two out of three of the judges of the Court of Appeal. Lord Justice Baggallay's judgment contained several passages which perfectly bear upon the present case. After affirming the liability of the cargo to pay salvage, he says:—

> In the terms of the section, it is a liability to pay "a reasonable amount of salvage;" but is this to be construed as a general personal liability to be enforced against the owners under any circumstances, whether the ship and cargo are lost or not, or as a liability capable of being enforced against, and therefore limited to the value of, the property, whether ship or cargo, saved from destruction?

After an argument, in which the latter construction is upheld, he says:—

> Upon the consideration of these several sections of the Act, I am of opinion that the liability to pay a reasonable amount of salvage to life salvors is imposed upon owners of cargo as well as upon owners of the ship, and that such liability

(1) B. & L. 341. (2) 1 P. D. 473; 2 P. D. 145.

is not a general personal liability to be enforced in any circumstances, whether the ship and cargo are lost or not, but a liability limited to the value of the property saved from destruction.

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I am of opinion that the owners of the lost ship are not personally liable to pay salvage, and I therefore reject the prayer of the owners of the specie to determine how much of the sum awarded by me was for salvage of life, and how much for salvage of the specie, and to declare that the owners of the *Sarpedon* ought to recoup to the owners of the specie the sum they have paid in respect of life salvage.

Nov. 27. The case was again mentioned, and the Court, after having heard counsel for the owners of the *Sarpedon* in support of an application for costs, and counsel for the owners of the specie in opposition thereto, condemned the owners of the specie in the costs incurred in the action by the owners of the *Sarpedon* other than the costs of the application.

Solicitors for plaintiffs: *Clarkson, Son, & Greenwell.*
Solicitors for owners of the specie: *Toller & Sons.*
Solicitors for owners of the *Sarpedon*: *Pritchard & Sons.*

THE BLESSING. (G. 166.)

1878.
Feb. 5.

Wages—Jurisdiction—The County Court Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 2—*Wages calculated according to Profits of fishing Voyage—Damages for wrongful Dismissal.*

The words "any claim for wages" in the 3rd section of the County Courts Admiralty Jurisdiction Act, 1868, include a claim for damages for wrongful dismissal by the master of a vessel engaged under a special wages agreement.

8 Asp. Ca. 337

THIS was an appeal from a decree of the county court of Durham, holden at Sunderland, dismissing for want of jurisdiction an action "for wages and wrongful detention and carrying off of certain goods" instituted on behalf of Thomas Gillson, master mariner, against the *Blessing*, in the sum of 38*l.* 9*s.*

A printed copy of the proceedings in the Court below was used for the purposes of the appeal. Such copy of the proceedings

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contained, inter alia, a copy of a document which was headed "Plaintiff's statement," and was in terms substantially as follows:—

PLAINTIFF'S STATEMENT.

1. On or about the 4th of October, 1876, the fishing-smack *Blessing* being in the port of Sunderland, her owner, the above-named defendant George S. Gulston, hired the plaintiff Thomas Gillson to serve as master on board the fishing-smack, the said plaintiff to be subject to and obey the reasonable and proper orders of the said defendant on the terms following, that is to say:—

A. The said agreement to be in force from the day of the date thereof up to Easter Day in the present year.

B. The plaintiff's wages or remuneration to be eleven sixty-fourths of the invoice price at which all the large fish sold and also his share of the smaller fish divisible among the crew (in the fishing trade known as stock o' bate); and in addition to the said wages to have and be provided with food and provisions during the said term.

C. The plaintiff to pay for one-fifth of the provisions supplied for the use of the crew on board the said fishing-smack.

2. Accordingly in the month of October last the plaintiff entered on board and into the service of the said defendant, and has always been ready and willing to obey the reasonable and proper commands of the said defendant in accordance with the said agreement.

3. The plaintiff continued on board the said fishing-smack performing his duty as a master until he was wrongfully discharged by the defendant before the term of the said agreement had expired.

4. The plaintiff did all things and was willing to do all things necessary on his part to entitle him to have the said agreement in all respects performed by the defendant, yet during the continuance of the said agreement the defendant wrongfully removed and discharged the plaintiff therefrom, and from the said fishing-smack, and refused to allow the plaintiff to perform the said agreement, and refused to allow him board, lodging, and provisions according to the said agreement in and on board the said fishing-smack.

5. The defendant detained on board the said fishing-smack, and refused to deliver up the clothing of the plaintiff mentioned in the schedule to these particulars, and the plaintiff claims as due to him the amounts set forth in the said schedule.

THE SCHEDULE REFERRED TO.

	£	s.	d.
Damages for wages from 8th of January, when plaintiff was wrongfully discharged to the 1st of April, 1877, twelve weeks at 2*l.* per week	24	0	0
Net board and lodgings, after deducting one-fifth of plaintiff's proportion for victualling during same period at 10*s.* per week	6	0	0
Share of stock o' bate at 15*s.* per week . . .	9	0	0
Value of clothing detained on board . . .	2	14	0
	£41	14	0

It appeared from a copy of the notes of the learned judge of the Court below that he had dismissed the action on the ground (1.) that assuming the claim of the plaintiff to have exceeded the amount to which the jurisdiction of county courts having Admiralty jurisdiction was limited (31 & 32 Vict. c. 71, s. 3) the Court of Admiralty could not have entertained the action as a wages suit; and (2.) even if the Court of Admiralty could have entertained such a suit, yet the action was not within the jurisdiction of a county court having Admiralty jurisdiction.

Feb. 5. *McClymont*, for the appellant. The words "any claim for wages" in the 3rd section of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), obviously mean any claim over which at the time of the passing of that statute the Court of Admiralty would have had jurisdiction in a cause of wages. Now, the agreement in this case is a wages agreement, and does not constitute the appellant a partner with the respondent: *The Frederick* (1); *Coffin* v. *Jenkins* (2); *Mair* v. *Glennie*. (3) This being so, there is authority for holding that if the claim of the appellant to recover damages for wrongful dismissal had been for a sum exceeding 150*l*. this Court, having regard to the provisions of the 10th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), must have entertained it in an action of wages: *The Great Eastern*. (4) The judge of the Court below was therefore wrong in refusing to take cognizance of the action as an action of wages. With regard to the amount claimed in the fourth item of the schedule to the plaintiff's statement, in respect of the wrongful detention of the appellant's effects, it is not necessary to shew that such a claim standing alone would be within the jurisdiction of a county court having Admiralty jurisdiction; the Court, however, might well hold that some sum in respect of that claim ought to be included in the amount which the appellant is entitled to recover as damages for wrongful dismissal: *The Ruckers* (5); *The Roebuck* (6); 32 & 33 Vict. c. 51, s. 2.

E. C. Clarkson, for the respondent. The question has never

(1) 5 C. Rob. 8.
(2) 3 Story, 108.
(3) 4 M. & S. 240.
(4) Law Rep. 1 A. & E. 384.
(5) 4 C. Rob. 73.
(6) 2 Asp. Mar. Law Cases, 387.

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yet been decided whether the statutory jurisdiction over claims for wages conferred on county courts having Admiralty jurisdiction is so extensive as to include cases like the present. On that point the case of *The Great Eastern* (1) is no authority in favour of the appellant, that case having been decided on the ground that the claim there was within the inherent jurisdiction of the Court of Admiralty.

SIR ROBERT PHILLIMORE. Shortly after I became judge of the Court of Admiralty I gave leave to the defendants in the case of *The Great Eastern* (1) to assert an appeal, but the case went no further. I feel no doubt as to the three first items of the plaintiff's claim, but I should have much hesitation in giving any decision without further consideration, on the fourth item.

McClymont. The appellant is willing to withdraw that part of his claim.

SIR ROBERT PHILLIMORE. I shall remit this case to the Court below, with an intimation that the three first items of the appellant's claim are within the jurisdiction conferred on county courts having Admiralty jurisdiction by the 2nd sub-section of the 3rd section of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71). On the authorities cited in argument I have no doubt that no question other than a question of wages is raised in the case. I allow the appeal and order the case to be remitted to the Court below for trial.

Solicitors for appellant: *Belfrage & Middleton.*
Solicitors for respondent: *Oliver & Botterill.*

(1) Law Rep. 1 Ad. & E. 384.

THE SARAH (M. 506. J. 513. L. 543; Liv.)

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Jan. 11.

Salvage—Services rendered in setting Salvors in Motion—Amount of Award.

A steam-tug, having a vessel in tow, saw a ship ashore and went out of her way to inform, and informed, another steam-tug of what she had seen. The other steam-tug thereupon proceeded to the stranded ship and towed her into safety. In an action of salvage instituted on behalf of both steam-tugs against the ship:—

Held, that the owners, master, and crew of both steam-tugs were entitled to salvage remuneration.

THREE actions of salvage were instituted against the ship *Sarah*, her cargo, and freight. The first action was instituted on behalf of the mate and two of the crew of the steam-tug *Great Western;* the second action on behalf of the owners, master, and the rest of the crew of the same vessel; and the third action on behalf of the owners, master, and crew of the steam-tug *Kingfisher.*

Two separate statements of claim were delivered; from which it appeared that the actions were brought to recover in respect of services rendered to the *Sarah* and her cargo on the 14th and 15th of October in last year, when the *Great Western* having in in consequence of information from the *Kingfisher*, proceeded to the Middle Mouse bank, and there found the *Sarah* on shore and temporarily left by her master and crew, had put the plaintiffs in the first action on board her, and ultimately succeeded in getting her off the bank and towing her into the Mersey in safety.

The 3rd, 4th, 5th, and 6th paragraphs of the statement of claim delivered in the second and third actions were in terms as follows:—

3. On the 14th day of October last, at between 10 and 10.30 A.M., it being then nearly low water, with a moderate gale from W.S.W. increasing, and a heavy sea running, the *Great Western* was about abreast of the Orme's Head, on the look out for vessels.

4. Under these circumstances the steam-tug *Kingfisher* came up and spoke the *Great Western*, and gave information that a vessel was ashore on the Middle Mouse.

5. In order to give this information, the *Kingfisher*, which was in attendance upon a vessel she had engaged to tow to Liverpool, was obliged temporarily to leave the said vessel and to go out of her way a distance of some miles, and but

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for her having done this those on board the tug *Great Western* would in all probability not have known the position and danger of the *Sarah*, and between the time of giving the said information and the *Sarah* being towed off, as hereinafter mentioned, no other tug was in the neighbourhood.

6. The *Great Western* at once, acting on the above information, proceeded towards the Middle Mouse, arriving there about noon.

The 24th, 25th, and 26th paragraphs of the same statement of claim contained allegations to the effect that the mate, seaman, and fireman of the *Great Western*, who had been put on board the *Sarah* and were the plaintiffs in the first action, were wrong in instituting a separate action, and that they were bound as to the amount of remuneration they were entitled to recover for their services by a custom existing in the port of Liverpool, whereby the master and crew of a steam-tug which had rendered salvage services were remunerated by a percentage on the amount of salvage award, graduated according to the rank which each held, and that according to the above custom the mate of the *Great Western*, as one of such plaintiffs, would be entitled to one and a half per cent. and the other two of such plaintiffs to one per cent. on such amount as the Court should think fit to award as salvage remuneration.

The actions having been consolidated, the defendants delivered a statement of defence; in which they alleged that they were ignorant of any such custom as that referred to, and that the bringing of more than one action in respect of the services rendered was improper.

The plaintiffs in the first action delivered a reply in which they denied the existence of the custom above referred to, and alleged that such custom was not binding on them.

W. G. F. Phillimore appeared for the plaintiffs in the first action.
Butt, Q.C., and *Potter*, for the plaintiffs in the second action.
Barnes, for the plaintiffs in the third action.
E. C. Clarkson, for the defendants.

Jan. 11. The action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House.

No witnesses were called for the plaintiffs in the first or third action or for the defendants, and so far as regards the claims of

all the plaintiffs to salvage remuneration, the counsel for the defendants submitted to the judgment of the Court upon the allegations contained in the respective statements of claim. Evidence was produced on behalf of the plaintiffs in the second action for the purpose of proving the custom referred to in their statement of claim. It was, however, ultimately arranged, after some discussion between counsel, with the consent of the Court, that the plaintiffs in the first action should, in addition to the percentage, to which if bound by the custom set up as above mentioned they would have been entitled, receive out of the sum to be awarded by the Court such further sum as the Court should think right.

The value of the *Sarah*, her freight and cargo, was taken at 6566*l.*, and it was admitted that, after the *Sarah* had been brought into the Mersey, the owners of the *Great Western* had incurred expenses amounting to 400*l.* for the purpose of getting the *Sarah* beached and her cargo removed.

SIR ROBERT PHILLIMORE. It has been very properly admitted in this case that a meritorious service has been rendered to the ship proceeded against, which was, in my opinion—an opinion which is shared by the Elder Brethren of the Trinity House—in a state of great danger. She was on a rock, on this bank or island, which is called the Middle Mouse, and had been left there by her crew; and I cannot doubt that, but for the immediate succour she received, she would have gone to pieces. The amount of personal peril incurred by those who rescued her, ought, we think in this case, to have considerable weight in determining what amount of salvage remuneration the Court ought to award, having regard not only to the service rendered in getting the vessel off the rock, but to the admitted state of the weather. Looking to all the circumstances of the case, and without thinking it necessary to recapitulate the principles on which salvage remuneration is awarded, I am of opinion, and the Elder Brethren agree with me, that, as the value of the property saved from total destruction, at considerable peril to the salvors themselves, is admitted to be 6566*l.*, I ought to award 3000*l.* as salvage remuneration. As to the distribution of this award, I am of opinion that the

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Kingfisher in conveying information to the *Great Western* with great rapidity, thus setting in motion the machinery by which the subsequent service was rendered, did render a meritorious service in the nature of salvage service, and I shall therefore award to her owners, master and crew, 60*l.* With respect to the three men who went on board the *Sarah*, I award to the mate 25*l.*, and to the two seamen 20*l.* each in addition to the percentage, which it has been arranged that they shall receive according to the alleged custom. The percentage must be calculated in the following way: From the total amount awarded the sum of 400*l.* due to the owners of the *Great Western* for expenses, and the said sums of 60*l.*, 25*l.*, 20*l.*, and 20*l.*, must be deducted, and the percentage calculated on the sum remaining. The residue of the sum awarded will be distributed between the owners, master, and remainder of the crew of the *Great Western*. The owners, master, and crew of the *Kingfisher* will have their costs. To the other plaintiffs I only allow one set of costs, to be apportioned according to the respective amounts of their taxed bills of costs.

Solicitors for the mate and two of the crew of the *Great Western*: *Tyndall & Paxton.*

Solicitors for the other plaintiffs: *Wright, Stockley, & Becket.*

Solicitors for defendants: *Stone & Fletcher.*

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Dec. 11.

STANES *v.* STANES.

Suit by Wife for Restitution—Agreement by Petitioner to stay Proceedings on Terms.

A wife who agrees, or authorizes her solicitor to agree, to stay proceedings in a suit instituted by her for restitution of conjugal rights, on certain terms, will be bound by such agreement, and will not be allowed to set the cause down for hearing.

THE petitioner, Amy Valpy Stanes, prayed for restitution of conjugal rights. Her husband in his answer alleged that she had been guilty of cruelty, and prayed for a judicial separation. After issue had been joined and the case was ready for hearing, negotiations for a settlement were entered into, and on the 25th of

July, 1877, there was a meeting between the solicitors on either side, at the office of the petitioner's solicitors, at which terms were agreed upon, and the following memorandum of agreement was signed by the solicitors:—

"Memorandum of terms of compromise of suit:

"1. Suit to be stayed, and petition and counter-prayer dismissed (subject to clause 2 hereof), charges in petition and answer being withdrawn. Respondent to pay petitioner's costs of suit, as between solicitor and client, and also petitioner's costs of compromise. Costs to be taxed if not agreed.

"2. Respondent to take out summons for child to spend Midsummer holidays with respondent, respondent undertaking to return him to same school at end of holidays. Petitioner to consent to order on the summons, after which the order of the third day of July, one thousand eight hundred and seventy-seven, to be null and void.

"3. Petitioner and respondent to live apart.

"4. Subsequent holidays of child, and times when he is away from school through ill-health, to be spent, when respondent is away from England, with petitioner, it being understood respondent intends going to India before the next Christmas holidays. When respondent in England, the child to pass half his holidays with his father, the other half with his mother.

"5. Respondent to allow petitioner twenty pounds per month for her maintenance and all other her expenses.

"6. Petitioner to have at all times control of child's wardrobe, and to provide him with everything he needs when with her, and also to pay his travelling expenses to and from school.

"7. Respondent to allow petitioner ten pounds for every holiday (not to be less nor more than thirty pounds per annum), for expenses of child up to sixteen years of age while with her, and for child's travelling expenses to and from school.

"8. A deed to be drawn up to embody this arrangement, and to include such clauses for the protection of the respondent against the petitioner's debts, or any breach of the provisions of the arrangement by her, as may be reasonably devised by the respondent's solicitors, and also all usual provisions for the mutual

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protection of the petitioner and respondent under the separation, in pursuance of this agreement.

"Dated this 25th day of July, 1877.

"Signed, &c."

The petitioner had since refused to execute a deed in which, as the respondent alleged, those terms were embodied.

Dr. Spinks, Q.C., and *Bayford*, for the petitioner, moved that the cause might be set down for hearing by the Court itself.

Inderwick, Q.C., and *Searle*, for the respondent, opposed the motion.

Two questions were raised on behalf of the petitioner, first, whether a wife could bind herself by an agreement not to prosecute a suit for restitution of conjugal rights; and secondly, whether the petitioner had in fact authorized her solicitor to enter into the agreement in question.

The cases of *Hooper* v. *Hooper* (1) and *Rowley* v. *Rowley* (2) were cited.

The facts are sufficiently stated in the judgment.

SIR J. HANNEN (President). I have already in the course of the argument expressed my general opinion as to the binding effect of an agreement of this kind upon a suitor in this court. I am of opinion that it makes no difference whether it is in a suit for restitution of conjugal rights or in a suit for judicial separation that the negotiations for a compromise arise, and that in any litigation in this court to which a wife is a party, she is competent to enter into an agreement with reference to that litigation. She is able to withdraw the proceedings or to put an end to them; she is able therefore to say upon what terms she will agree to put an end to them. And if, as a matter of fact, she has entered into an agreement to stay the proceedings, the Court will be bound to inquire whether she is departing from the arrangement which she has entered into when she calls upon it again to put the proceedings in motion.

It must be understood that my observations apply exclusively

(1) 1 Sw. & Tr. 602; 30 L. J. (P. & M.) 49.

(2) 3 Sw. & Tr. 338; 4 Sw. & Tr. 187.

to the facts before me. This is a case in which a suit is pending by the wife for a restitution of conjugal rights, and she, as it is alleged, has entered into an agreement that that suit shall be stayed, and I am of opinion that such an agreement, if really and truly entered into by her, is one which the Court will so far act upon, that it will not again set in motion the proceedings which she has agreed shall be stayed.

The next question is, whether or not this lady agreed that these proceedings should be stayed. Let us see what the lady says with regard to her being bound by these terms. She says in her affidavit that on the 24th of July she was informed that Mr. Gard, the respondent's solicitor, and a brother of the respondent, were in an adjoining room, and that her solicitors were there represented by Mr. Farrar, with whom she had generally corresponded throughout the proceedings. In other words, Mr. Farrar, the member of the firm who had advised with her up to that time was the person there to represent her interest. She goes on to say that Mr. Farrar occasionally came to her and reported the terms of compromise suggested on behalf of the respondent. That is to say, he came from one room to the other and consulted with her upon each of the terms which was proposed upon the opposite side; "but," she adds, "they were of such a character that I refused to comply with them, and the interview terminated without anything being arranged." That is to say, her solicitor did what one might expect of him: he consulted with her upon the terms proposed, and she exercising her judgment, refused those terms as being too hard upon her, and accordingly the negotiations then went off. But on the next day, the 25th of July, this agreement was signed by the solicitors for the petitioner and the respondent respectively.

Mrs. Stanes' affidavit continues: "The next day, namely, the 25th of the said month of July last, at the request of the said Mr. Farrar, I again attended at the office of my said solicitor, and was informed that Mr. Gard was in the adjoining room, and had considerably modified the proposals on behalf of the said respondent, and ultimately it was thought the terms proposed were such as I should accept." Now, I pause there for a moment to remark that she nowhere states that she did not know what the terms were which were proposed; she nowhere says they were not submitted

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to her, as they had been submitted to her on the day previous; she says nothing from which I can draw the inference that she did not fully know what was proposed on the one side and on the other. Her affidavit proceeds: "And upon leaving I was informed that the terms would be embodied in a written memorandum of compromise which would ultimately be extended in a deed which should be sent to me for perusal." The document now before the Court signed by the solicitors is the memorandum of agreement, which she says she was told would be the embodiment of the terms which had been discussed. Now, there is no affidavit from her solicitor confirming, if he could confirm, the impression which I suppose the careful language used by her was intended to make upon my mind, that she did not know what the terms of arrangement were; and, considering what had taken place upon the previous day, I draw the inference of fact that she did know the terms which her solicitor thought she ought to accept, and which he informed her he thought she ought to accept, and which he did in fact embody in an agreement in writing of that day's date. I come to the conclusion, therefore, as a matter of fact, that she knew the terms of the agreement, and that she is bound by them.

With regard to the further question of what interpretation is to be put upon them, that depends upon many considerations which are not before me. I do not know what the husband's means are. I do not know whether he has the power of making her an allowance which should be for her life, or whether all his means die with him; and I have no means of forming an opinion upon the subject.

All, therefore, that I have to say upon this point is, I consider that the agreement is binding on her, and it must be carried out by a deed which should, to use her own language, extend the terms which are embodied in this agreement. If any question arises upon the meaning of those terms, the better plan will undoubtedly be to let that question be settled by some conveyancing counsel, who would say whether the deed, as tendered for execution by the lady or on her behalf, is a fulfilment of the terms of the agreement. My present decision is to this effect, and to this effect only. I am of opinion, as a matter of fact, that the petitioner

did assent to the terms embodied in the memorandum, and that she is bound by it, and, therefore, I shall not allow the case to be set down for hearing.

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Solicitors for petitioner: *Chapple & Welch.*
Solicitors for respondent: *Gard & Corbin.*

BRADLEY *v.* BRADLEY.

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April 16.

Sect. 32 *of* 20 & 21 *Vict. c.* 85—*Order for permanent Maintenance after Decree absolute.*

The Court has power under s. 32 of 20 & 21 Vict. c. 85, to make an order for the permanent maintenance of a wife after a decree absolute has been pronounced.

Vicars v. *Vicars* (29 L. J. (P. & M.) 20), overruled; see also *Sidney* v. *Sidney*, (Law Rep. 1 P. & D. 78), and *Charles* v. *Charles* (Law Rep. 1 P. & D. 260).

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THE question in this case was whether the Court has power to make an order under the 32nd section of the 20 & 21 Vict. c. 85, for the maintenance of a wife who has obtained a decree absolute for the dissolution of her marriage, after the date of that decree, or whether it is necessary that the order should form part of the decree.

April 2. *Inderwick, Q.C.* (*Dr. Swabey* with him), for the petitioner, admitted that it had been the practice to embody orders made under the 32nd section in decrees absolute, and cited *Vicars* v. *Vicars* (1); *Sidney* v. *Sidney* (2); *Charles* v. *Charles* (3); *Fitzgerald* v. *Fitzgerald* (4); *Gladstone* v. *Gladstone* (5); *Wait* v. *Wait and Flower*. (6) But he submitted that the effect of the decision of the House of Lords on the appeal of *Sidney* v. *Sidney* (7) had never yet been considered by this Court. The effect of that decision was, that an order under the 32nd section was separate and distinct from the decree dissolving the marriage, and that being so, there was nothing in the words of the statute to prevent the order being made after the decree had been pronounced.

(1) 29 L. J. (P. & M.) 20.
(2) Law Rep. 1 P. & D. 78.
(3) Law Rep. 1 P. & D. 260.
(4) Law Rep. 3 P. & D. 136.
(5) Law Rep. 1 P. & D. 444.
(6) Law Rep. 2 P. & D. 228.
(7) 36 L. J. (P. & M.) 73.

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Bayford, for the respondent, submitted that all the decisions, as well as the uniform practice of the Court, were against the power of the Court to make an order after the decree. The construction which had been put on the 32nd section was that the question of maintenance was to be finally determined at the time when the decree absolute was pronounced. The judgment of the House of Lords in *Sidney* v. *Sidney* (1) was not inconsistent with and did not overrule the decisions by which the practice of the Court had been regulated up to the present time.

Cur. adv. vult.

SIR J. HANNEN (President). This was a suit by a wife against her husband for dissolution of their marriage on the grounds of cruelty and adultery. These charges were established, and a decree nisi was pronounced, which was made absolute on the 20th of November, 1877.

On the 3rd of December a petition was filed, praying the Court to exercise the authority given by s. 32 of the 20 & 21 Vict. c. 85, to order the respondent to pay alimony to the petitioner. The language of that section is as follows: "The Court may, if it shall think fit, on any such decree" (that is, on any decree for dissolution of marriage) "order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money, or such annual sum of money, for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery, to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said Court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed; and upon any petition for dissolution of marriage the Court shall have the same power to make interim orders for payment of money by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation."

On the 14th of January, 1878, the respondent filed his answer to the petition for alimony, and therein answered the allegations

(1) 36 L. J. (P. & D.) 73.

as to his means set forth in the petition, but made no objection to the petition being entertained by the Court.

On the 13th of February the petitioner filed her reply.

On the 22nd of February the respondent filed a rejoinder.

Thereupon the pleadings were referred to the registrar under rule 101. He proceeded to investigate the averments therein contained on the 11th and 18th of March, 1878, when the respondent was cross-examined as to his means, and the registrar has reported to the Court that the petitioner is entitled to alimony at the rate of 100*l.* a year, subject to the objection now taken to the jurisdiction of the Court.

It is contended for the respondent that, as the 32nd section of 20 & 21 Vict. c. 81, gives power to the Court to order alimony on any decree for dissolution, the power can only be exercised at the time the decree is pronounced, and not a day after.

It has been the practice to file the petition for alimony after the decree nisi, and before the decree absolute, in accordance with the 96th rule, by which it is ordered that "in cases of application for maintenance under s. 32 of 20 & 21 Vict. c. 85, such petition may be filed as soon as the decree nisi has been pronounced, and not before." It has also been the practice to embody the order for permanent alimony in the decree dissolving the marriage; and in the case of *Sidney* v. *Sidney* (1), it was held by the full Court that the order under the 32nd section must form part of the decree for dissolution, and, as a consequence, that an appeal from an order for alimony should be to the House of Lords, and not to the full Court.

This decision, however, was overruled by the House of Lords, and Lord Westbury very clearly explains the nature of the order for alimony. The case appears to be reported only in the Law Journal at p. 74, vol. 36, Probate and Matrimonial. He says:— "Now when a decree has been pronounced dissolving a marriage, the subordinate jurisdiction given by the 56th clause of the original statute arises, and not till then. It is an application made to the discretion of the Court, and the Court, in deciding upon it, would be guided by a consideration of facts and circumstances altogether different from those which guided the Court in deter-

(1) Law Rep. 1 P. & D. 78.

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mining whether it would annul or dissolve the marriage or not. It is, therefore, a totally different proceeding, a proceeding for a different object, the power of entertaining which arises only when the original jurisdiction has been exercised and its purpose fulfilled, and it is a discretionary jurisdiction which is to be governed in its exercise altogether by the consideration of a variety of circumstances forming matter of allegation, and, if need be, matter of evidence, wholly and entirely apart, and different from, that which is to obtain in a petition for a dissolution of marriage." Again, he says: "As I have already observed, the petition for the dissolution of the marriage must be finally decided first before the right to exercise the auxiliary or supplementary discretionary power can by possibility arise. It is absurd, therefore, to confound the one thing with the other, and to ascribe to the discretionary order which follows upon the judgment the character of being an order pronounced upon a petition for the dissolution of the marriage. In fact, although it may not be so in terms, it is really an order pronounced upon an application to the discretionary power of the Court, which application can only be made after the other and more important jurisdiction has been exercised." It appears to me, from these passages, that the ratio decidendi of the judgment of the House of Lords is that the jurisdiction of the Court to make an order for alimony does not arise until the Court has pronounced the decree of dissolution—that it may indeed be embodied in the same judgment, but that there is nothing in the Act which requires it to be so, and that it is in fact more regular for the Court to pronounce a separate decree for maintenance, after it has made absolute the decree nisi for dissolution.

If I had not the decision of the House of Lords to guide me, I should arrive at the same conclusion. The word "on" is an elastic expression, which, so far from excluding the idea of its meaning after, is more consistent with that signification than any other. In some cases the expression "on" may undoubtedly mean contemporaneously or immediately after, and the question now before the Court is, whether there is anything from which it can be seen that the legislature used the word in the 32nd section in this restricted sense? In some instances, as in questions of costs, it may be inferred that the legislature intended the Court

to act at the time, that is, on the occasion of the facts being brought to its knowledge, and while those facts are fresh in its recollection, but no such reasons apply to the order for maintenance. That is to be the result of a separate investigation of facts, not necessarily before it when the decree of dissolution is pronounced. The investigation of the husband's means may be protracted, he may throw difficulties in the way of the Court obtaining the materials upon which to pronounce a just decision, or ordering a proper deed for the security of the wife being prepared. Where the husband is the petitioner, the decree which he asks may be suspended until he does what is right; but where the wife is the petitioner, to suspend the decree until the husband does something, would delay the wife in obtaining redress as to the main object of the suit, because the respondent refuses to give her the means of obtaining a decision on a totally distinct and incidental question.

This is a result so obviously unreasonable that the Court is bound to avoid it, unless constrained by the clearest language to adopt it. It was urged that where authority is conferred by the legislature to vary settlements (23 & 24 Vict. c. 144, s. 5), the power is given to do so "after" a final decree, and that it is to be presumed that this word was used advisedly with the object of giving a larger power than existed with regard to maintenance. But I cannot draw this inference. No reason was suggested, or has occurred to my mind, why such a distinction should be made. I rather infer that the word "after" is used as the equivalent of the word "on" in the earlier enactment.

I am of opinion, therefore, that I have jurisdiction to entertain this petition. The only question which remains is, whether the petitioner, by her delay, has by the practice of the Court precluded herself from instituting these proceedings. By the 95th rule it is directed that applications to the Court to exercise the authority given by the 32nd section and other sections which are mentioned, are to be made in a separate petition, which must, unless by leave of the judge, be filed as soon as by the said statutes such application can be made or within one month thereafter. If the 32nd section is to be construed in connection with the 96th rule the petitioner has not made her application within

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one month after the earliest time at which it might have been made. But assuming as I do that I have the power, I think it is a case in which I ought to give leave to the petitioner to make her application at a later period. The objection was not taken by the respondent until all the expense and delay of the investigation of his means had been incurred, and it is not shewn that any prejudice has accrued to the respondent by the petition for maintenance not having been presented fourteen days sooner.

I shall therefore make an order on the respondent in accordance with the registrar's report.

Solicitors for petitioner: *Shaen, Roscoe, & Massey.*
Solicitors for respondent: *Brooks, Jenkins, & Co.*

May 14.

NIBOYET *v.* NIBOYET.

Divorce—Foreigner—Jurisdiction.

N., a Frenchman, acting as French consul in this country, filed a petition in the English Divorce Court for dissolution of his marriage, and afterwards consented to its dismissal.

His wife then filed a petition in the same Court for dissolution of the marriage. The wife was a British subject at the time of the marriage, which was celebrated at Gibraltar, and the alleged adultery by her husband, and the greater part of the desertion, occurred in England:—

Held, that the English Court had no jurisdiction to dissolve the marriage.

On the 23rd of October, 1876, Caroline Prudence Niboyet, filed a petition in the Divorce Division of the High Court of Justice, praying for a dissolution of her marriage, and alleging adultery, coupled with desertion, for two years and upwards. The petition alleged in substance as follows:—

1. Her marriage on the 25th day of October, 1856, with Jean Alexander Paulin Niboyet, at the church of the Holy Trinity, Gibraltar.

2. Cohabitation at Seville, in Spain, at divers places in Paris, in France, and at Stockholm, in Sweden, and issue of the marriage two daughters, aged nineteen and seventeen years.

3. Desertion for two years and upwards without reasonable excuse.

4 and 5. Adultery, with Phœbe Winter, at 22, Tatham Street, Sunderland, in the county of Durham, and elsewhere in the neighbourhood thereof, since 1867.

On the 16th of November, 1876, the respondent filed his act on petition, which in substance, alleged as follows:—

1. The respondent was born of French parents at Maçon, in the republic of France, in the year 1826, and had there his domicil of origin.

2. The respondent first left France in the year 1848, in the service of the French Foreign Office, and held various appointments in the consular service of the said government, at various places out of France and out of the jurisdiction of this honourable Court, between the years 1848 and 1862.

3. In the year 1862, the respondent was appointed by the said government, vice consul at Sunderland, in England, and resided there in the discharge of his consular duties, until the year 1869.

4. Between the years 1869 and 1875, the respondent held appointments in the consular service of the said government at places out of France and out of the jurisdiction of this honourable Court.

5. In the year 1875, the respondent was appointed by the said government, acting consul at Newcastle-on-Tyne, in England, and resided there in the discharge of his consular duties and not otherwise, from the time of such appointment until the commencement of this suit. At or about the time of the commencement of this suit, the respondent was withdrawn from his said consular appointment at Newcastle-on-Tyne aforesaid, and proceeded to Paris by direction of the said government.

6. During the whole period of the respondent's absence from France, as aforesaid, he retained his French domicil, and has not now and never has had any domicil in England.

On the 6th of December, 1876, the respondent filed her answer which, amongst other things, stated as follows:—

1. That the respondent by petition to this honourable Court, dated the 19th May, 1863, charged the now petitioner with adultery with a person herein named, and prayed that his

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marriage with the said petitioner should be dissolved by reason of the adultery therein alleged. (1)

2. That by an order of this Court bearing date the 21st of March, 1865, the petition of the said respondent was dismissed on payment of the costs incurred by the then petitioner.

3. That the petitioner's domicil of origin was English.

4. That the marriage of the petitioner with the respondent took place within the British territory of Gibraltar.

5. That on or about the month of April, 1859, the respondent deserted the petitioner.

6. That since about the month of April, 1859, to the present date, the petitioner has lived at divers places in England.

7. That the adultery charged against the respondent is alleged to have taken place in England during his residence at Sunderland, aforesaid.

(1) The following is the substance of the proceedings in that suit :—

Petition.

1. "The marriage.

2. "Cohabitation at Seville, in the kingdom of Spain, at No. 7, Calle de las Sierpes, and at No. 77, Rue Notre Dame des Champs, Paris, in the empire of France, at No. 3, Rue des Suassaires, Paris, aforesaid, at the Chancery of the French Legation at Stockholm, in the kingdom of Sweden, and at No. 30, Boulevard des Batignolles, Paris, aforesaid, and issue of the said marriage two daughters.

3. "Adultery by the respondent in the months of July, August, and September, 1861, at St. Valery-sur-Somme, in the Department of the Somme, in the empire of France, with Leon Chapotin, and in the months of July and August, 1861, at Cayeux, in the Department of Somme, in the empire of France, with the said Leon Chapotin.

4. "Adultery between October and the date of the petition at No. 11, Rue Menil Montant, at No. 30, Boulevard des Batignolles, and at No. 4, King St. George aux Batignolles, Paris, and other places in the said city of Paris, and empire of France, with the said Leon Chapotin."

Answer by respondent denying the allegations of the petition, and joinder of issue.

Motions to take directions as to evidence, and for a commission to examine witnesses abroad which were ordered to stand over.

An order to amend petition.

Both motions again in the paper, and ordered to stand over at Mr. Niboyet's request, which was the last proceeding he took in the suit.

March 21st, 1865. Mrs. C. P. Niboyet's counsel moved the Court to dismiss her husband's petition for want of prosecution.

"March 21st, 1865. Order dismissing suit. Upon reading affidavit and hearing counsel for the respondent, and by consent of the petitioner the judge dismissed the petition upon the petitioner paying to the respondent the costs incurred in her defence, and the costs of appearing on this motion."

On the 22nd of December, 1876, the respondent rejoined, stating, amongst other things, as follows:—

1. Admits the statements contained in paragraphs 3 and 4 of the said answer, but says that no judgment or decree was pronounced by the Court in such proceedings, and the question of the jurisdiction of the said Court to entertain the said petition was not in any way determined.

The respondent filed an affidavit, in which he stated as follows:

1. I hold at the present time the official rank of consul of France, and my legal and political domicil is at Paris, aforesaid. My mother resides at 82, Rue d'Amsterdam, aforesaid, and my permanent place of abode is at her residence.

2. I have been successively chancellor, vice-consul or consul in the Sandwich Islands, at Leipsic, Germany, at Seville and Algleiras in Spain, at Stockholm in Sweden, at Chicago in North America, and at Sunderland in the county of Durham, in England.

3. In consequence of the illness in May, 1875, of Mr. Bellaighe de Bughas, the present French consul at Newcastle, I was directed by the French Ministry of Foreign Affairs to proceed to Newcastle as French consul, ad interim, or acting French consul there during the temporary absence on leave of the said Mr. Bellaighe de Bughas. I accordingly went to Newcastle on the 24th of May, 1875, in such capacity of French acting consul or French consul, ad interim, for a period of three months. This period has been prolonged from time to time by reason of the continued indisposition of the said Monsr. Bellaighe de Bughas, but his leave will expire on the 24th of May next, and that is the extreme limit to which such leave can be extended, and on or before that date he will consequently have to return to Newcastle. My duties as acting consul at Newcastle, aforesaid, will then cease, and on their so doing it is my intention immediately to return to Paris, aforesaid.

4. I have no permanent house or place of abode at Newcastle or elsewhere in Great Britain. Since I have been at Newcastle I have been residing in furnished lodgings only; and I possess no real property whatever in England, and have no money invested in English securities.

5. I have supported my wife since the time when we have been

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living apart, being a period of about eighteen years, and have made her during such time a monthly allowance of 12*l.*, and this amount has been duly paid to her.

The respondent having failed to set down the act on petition within the proper time, the petitioner set it down; and on the 16th of May, 1877, notice thereof was duly served upon the respondent's solicitors.

At the hearing the respondent failed to appear, and thereupon the Queen's proctor, by direction of the Court, intervened, and submitted for argument the following questions, viz.:—

1. Whether, it being admitted by the petitioner that the respondent has a French domicil, this Court has any jurisdiction as a matter of general law?

2. If it has not jurisdiction as a matter of general law, whether the particular circumstances of this case give it jurisdiction?

Inderwick, Q.C., and *Dr. Swabey*, for the petitioner. The first petition having been filed by the present respondent and dismissed with his consent, he has thereby submitted to the jurisdiction of this Court as to his marriage: *Enohin* v. *Wylie* (1); *Mordaunt* v. *Moncreiffe* (2); *Tollemache* v. *Tollemache* (3); *Ratcliff* v. *Ratcliff* (4); *Deck* v. *Deck* (5); *Bond* v. *Bond.* (6) The case of *Brodie* v. *Brodie* (7) is conclusive, for in that case it was admitted there was no domicil, and the only ground of jurisdiction was a residence at the time of the suit. In this case the wife was an English woman at the time of the marriage. The marriage was in British territory, and the adultery and the greater part of the desertion were in England; and the respondent was, at the time of service of the proceedings in the suit, living within the jurisdiction. The wife has been resident here since 1859. There is a clear distinction between the subject-matter of the suit and a personal exception: Pothier, Traité de la Procédure Civile de l'Incompetence, cap. ii. § 2, pp. 18, 19. The personal exception may be waived: *Enohin* v. *Wylie.* (1) Domicil alone is sufficient

(1) 31 L. J. (Eq.) 402.
(2) Law Rep. 2 Sc. & Div. App. 374.
(3) 1 Sw. & Tr. 557.
(4) 1 Sw. & Tr. 467.
(5) 2 Sw. & Tr. 90; 29 L. J. (P. M. & A.) 129.
(6) 2 Sw. & Tr. 93; 29 L. J. (P. M. & A.) 143.
(7) 2 Sw. & Tr. 259.

for jurisdiction: *Wilson* v. *Wilson.* (1) In *Le Sueur* v. *Le Sueur* (2) no reference was made to the statute 20 & 21 Vict. c. 85, but by the 27th section "any wife" may present a petition.

Gorst, Q.C., and *Greenwood*, contrà. Domicil is the test of jurisdiction in these cases. Consent cannot give jurisdiction: *Callwell* v. *Callwell and Kennedy.* (3) The domicil of the wife is that of her husband: *Sottomayor* v. *De Barros.* (4) Residence is not sufficient, there must be domicil: *Firebrace* v. *Firebrace* (5); Phillimore on International Law, 2nd ed. vol. iv. p. 347, § 496; Pothier, Introd. Contr. de Marr., No. 522; Story's Conflict of Laws, § 46; Bishop on Marriage and Divorce, 4th ed. vol. ii. § 124; *Yelverton* v. *Yelverton* (6); *Warrender* v. *Warrender* (7); *Dolphin* v. *Robins* (8); *Pitt* v. *Pitt* (9); *Shaw* v. *Attorney-General.* (10)

Inderwick, Q.C., in reply.

Cur. adv. vult.

1878. May 23. SIR ROBERT PHILLIMORE. This is a suit for divorce by reason of adultery and desertion, and is brought by Caroline Prudence Niboyet against her husband Jean Alexandre Paulin Niboyet. The marriage took place on the 25th of October, 1856, at Gibraltar, according to the rites of the Church of England, and there are now living, the issue of that marriage, two daughters, one of nineteen and the other of seventeen years of age. The wife states in her petition that the husband has deserted her for two years and upwards, and that he committed adultery in the year 1867, and has continued this intercourse up to the present time.

The citation was personally served on the husband at Newcastle-on-Tyne, where he resides. He has entered an appearance and filed an act on petition, but has not appeared in court personally or by counsel. In the act on petition he sets forth that he is a Frenchman by origin and domicil, being employed in this country as a consular officer of the French Republic, and for these reasons is not subject to the jurisdiction of this Court. The wife admits

(1) Law Rep. 2 P. & D. 435.
(2) Law Rep. 1 P. Div. 139.
(3) 3 Sw. & Tr. 259.
(4) Law Rep. 2 P. Div. 81.
(5) Not yet reported.
(6) 1 Sw. & Tr. 574.
(7) 2 Cl. & F. 563.
(8) 7 H. L. C. 300.
(9) 4 Macq. 627.
(10) Law Rep. 2 P. & D. 156.

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the facts stated, but denies the legal conclusion, and maintains that notwithstanding her husband is by origin and domicil a foreigner, he is amenable to the jurisdiction of this Court; and she further maintains that he has by a former act submitted himself to this jurisdiction, and cannot now repudiate it. It may be as well to deal first with the last of these positions.

The former act of alleged submission is that in May, 1863, he petitioned this Court for the dissolution of his marriage on the ground of the adultery of his wife. The petition was never heard, and was dismissed apparently by consent of both parties in March, 1865. I have no hesitation in pronouncing that these circumstances do not constitute a submission on the part of the husband to the jurisdiction of this Court. It is, therefore, unnecessary to consider the serious question whether consent of parties, if it had been given, would found a jurisdiction not otherwise given.

The main argument addressed to me, in support of the petitioner's contention that her husband is amenable to the jurisdiction of this Court, has been derived from the words of the statute 20 & 21 Vict. c. 85 (The Divorce and Matrimonial Causes Act). It has been contended that the language of the 27th section of that Act, which founds the jurisdiction of this Court in the matter of the dissolution of the marriage bond, renders it unnecessary that the husband, against whom the wife brings her suit, should be either an English subject or domiciled in England. The words of the section referred to as establishing this position are the following:— "It shall be lawful for any husband to present a petition to the said Court praying that his marriage be dissolved on the ground that his wife has, since the celebration thereof, been guilty of adultery; and it shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved" on the grounds which are in the section stated. Any husband or any wife, it is insisted, to whatever country they may belong, however short a time he or she may have been in England, is entitled to call upon this Court to annul the contract of marriage, and alter the status of a foreign subject.

This is, indeed, a very startling proposition, and one, in my judgment, so much at variance with the true principles of private international law that I should be very loath to find myself com-

pelled to assent to it. I do not think it was the intention of the legislature to give to this Court such unlimited authority over the status of foreigners. The preamble of the statute says, "Whereas it is expedient to amend the law relating to divorce, and to constitute a Court with exclusive jurisdiction in matters matrimonial in England," &c. The statute does not extend to any other countries, but if every foreign visitor in England were liable to its jurisdiction, it would practically extend not only to Ireland and Scotland but indeed to every foreign state, whose subject happened to be for any temporary purpose in this kingdom. I think it was not intended to give this Court the general jurisdiction which has been contended for in this case. In the recent case of *Firebrace* v. *Firebrace* (1), the president said, "The domicil of the wife is that of the husband, and her remedy for matrimonial wrongs must usually be sought in the place of that domicil." In the case of *Wilson* v. *Wilson* (2), Lord Penzance said: "Now it is not disputed that if the petitioner was domiciled in England at the time the suit was commenced, this Court has jurisdiction; but where any residence in this country short of domicil, using that word in its ordinary sense, will give the Court jurisdiction over parties whose domicil is elsewhere, is a question upon which the authorities are not consistent." I am afraid this statement is correct. It is to be observed, however, that in the present case the husband is not only a foreign subject, but is employed in this country in the discharge of duties belonging to a foreign public office which incapacitates him from acquiring a domicil in this country.

I think it unnecessary to examine in detail the cases which have been cited, as I recently had occasion to refer to, and examine, them in the case of *Le Sueur* v. *Le Sueur* (3). In the case just cited of *Wilson* v. *Wilson* (4), Lord Penzance said: "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon all the parties, in all cases, referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the cases which should

(1) Not yet reported.
(2) Law Rep. 2 P. & D. 441.
(3) Law Rep. 1 P. Div. 139.
(4) Law Rep. 2 P. & D. 435.

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justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. The honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another." With these remarks, so far as they relate to the dissolution of the marriage bond, I agree. Upon the whole I think myself bound both on principle and by precedent to pronounce that the Court has no jurisdiction in this suit, and I must therefore dismiss it.

Petition dismissed with costs.

Solicitors for petitioner: *Chapman, Turner, & Pritchard.*
Against the petition: *Queen's Proctor.*

[IN THE COURT OF APPEAL.]

June 7.

THE GENERAL STEAM NAVIGATION COMPANY *v.* THE OWNERS OF THE STEAMSHIP OCEANO.

THE OCEANO.

[1877 G 422]

Collision—Crossing Ships—Rules for Navigation of the Thames, rule 29.

Where one of two steamers in the Thames was steering parallel to the shore and the other was steering in an oblique course across the stream:—

Held, that they were crossing vessels, so that under the 29th of the rules of 1872 for the navigation of the Thames, the one which had the other on her own starboard was bound to keep out of the way of the other.

The Velocity (Law Rep. 3 P. C. 44) considered.

THIS was an appeal by the plaintiffs, the owners of the steamship *Virgo*, from a judgment of Sir R. J. Phillimore, pronouncing both ships to blame for a collision between the *Virgo* and the *Oceano*.

The collision took place in clear weather soon after noon on the 29th of December, 1877. The *Oceano* was going up the Thames in the Hope reach below Gravesend against an ebb tide, and was proceeding along the river on the northern side of the mid-channel. A little below the Ovens buoy the *Oceano* starboarded her helm to avoid a brigantine which was coming down the river, there not being room, as the witnesses on behalf of the

Oceano stated, to pass on the north side of the brigantine. She did not then resume her former course but steadied, and continued going obliquely across the river until the collision with the *Virgo* took place near the southern shore.

The *Virgo* was a steamship coming down the river on the southern side of the mid-channel along the Gravesend reach. She had to deflect her course in order to avoid another vessel, but had resumed her course along the southern shore some time before the collision took place.

The collision took place about the meeting of the two reaches, which are at a considerable angle to each other, so that if each vessel had been proceeding along the middle line of the stream their courses would have been nearly at right angles to each other.

When a collision was imminent the *Virgo* stopped her engines and put her helm hard a-port, and it was contended on the part of the *Oceano* that this caused the collision. The Court of Appeal, however, came to the conclusion that the only effect of this manœuvre was to diminish the violence of the collision.

The result was that the stem of the *Virgo* struck the *Oceano* on the starboard side and so injured her that she filled.

Sir R. J. Phillimore held both vessels to blame and gave judgment accordingly. The plaintiffs appealed. The case was heard before the Court of Appeal, with nautical assessors.

May 28, 31. *Butt, Q.C.*, and *E. C. Clarkson*, for the appellants.

Milward, Q.C., and *Dr. Phillimore*, contrà.

[*The Velocity* (1); *The Ranger and The Cologne* (2); and *The Esk* (3); and the Rules for the Navigation of the Thames, issued in 1872, rule 29, were referred to.]

Cur. adv. vult.

June 7. The judgment of the Court (James, Baggallay, and Bramwell, L.JJ.) was delivered by

JAMES, L.J. In this case the learned judge from whom this appeal is brought, by and with the advice and concurrence of his nautical assessors, pronounced both the ships, the *Oceano* and the *Virgo*, to blame, and made the consequential order thereon.

(1) Law Rep. 3 P. C. 44. (2) Law Rep. 4 P. C. 519.
(3) Law Rep. 3 P. C. 436.

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But except in the general allegation that a collision in broad daylight in an unobstructed and wide channel of the river Thames was very disgraceful, and the general statement that both ships had time enough each to get out of the way of the other, we are not informed as to what particular wrongful act or wrongful omission the Court below finds to have been established by the evidence against either of the litigant ships.

There are two distinct issues to be determined. Was the *Oceano* to blame? the burthen of proof on that issue being on the *Virgo*. Was the *Virgo* to blame? the burthen of proof on that issue being on the *Oceano*.

On the first issue the skilled assessors whose assistance we have, unhesitatingly pronounce their concurrence with the finding of the Court below. They advise us that, irrespectively of any special rule of navigation, the *Oceano* was clearly and very much in the wrong. The *Oceano* was proceeding up the river in the Hope reach below Gravesend against an ebb tide, and was, when the movements began which ultimately led to the collision, near the Essex shore, as near which as the ship could conveniently go was the proper and ordinary course for her to take. A little below the Ovens buoy, she had to deflect her course in order to pass a brigantine, the *William*, which was going down the river. At this time, the *Virgo* was going down the river, and according to the usual and normal course was going as near the Kent shore as she conveniently could. She also had to deflect her course to pass some craft at anchor. Both ships were thereby brought nearly into the mid-stream. At the time the *Oceano* manœuvred to clear the brigantine she must have been very near the north shore, because according to the *Oceano's* own case she could not then have safely gone between the brigantine and that shore. When she had cleared the brigantine, her proper course then would have been to have ported her helm so as to bring her back to her original course, and to have proceeded in that course along the waterway which was open and clear before her.

Our assessors are of opinion that there was nothing which she saw, or could have seen in the position or course of the *Virgo*, to require or justify her in not taking that course. But instead of that she continued in the direction which she had assumed in

order to clear the brigantine, obliquely across the channel, until she came into collision with the *Virgo*, close to the Kentish shore. Moreover, when she was approaching the *Virgo*, she took no precaution, she did not, as she ought to have done, ease or stop, or reverse her engines until it was too late, until she was warned by the whistle of the other ship, and when it was too late to do anything.

Further than this, our assessors have also pointed out that the *Oceano* clearly violated the special rules of navigation enacted for the river Thames. By the 29th of those rules it is, amongst other things, provided that "if two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." And our assessors are of opinion that the ships were crossing ships, and that the *Oceano* being the crossing ship which had the other on her starboard side, was under an obligation to keep clear of the other vessel. It was suggested to us that the decision of the Privy Council in *The Velocity* (1) had established that the rule as to crossing ships did not apply to the river Thames. It is difficult to conceive how a decision of the Privy Council on the general maritime rules in 1869, could be held so to nullify an express provision in the local legislation promulgated in the year 1872, specially and exclusively for the regulation of the navigation of the Thames itself. It may be convenient further to notice that there seems to be a great misapprehension, induced probably by the language of the marginal or headnote of the case, as to what was really decided by that case. It seems to have been considered that it was laid down generally that the rule as to crossing ships could not be applied in a winding and crowded river like the Thames. What was decided really was, that in such a river the particular direction taken for a moment, or a few moments, in rounding a corner or avoiding an obstacle, was not such an indication of the real course of the ship as to justify another ship in saying, "I saw your course, I saw that if you continued in that course we should be crossing ships, and I left to you, therefore, the entire responsibility of getting out of my way under the rule." And all that was really decided was, that in the particular part of the Thames, and under the particular circumstances which the

(1) Law Rep. 3 P. C. 44.

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Court had to deal with in that case, a vessel was not by that rule exonerated from the consequences of her omission to do what good seamanship required her to do. And this is made quite clear in the subsequent case of *The Ranger* (1) in which the *Velocity* case was carefully examined, and in the particular circumstances of that case followed.

In the case we have to deal with there were no special circumstances to interfere with the application of the rule. If ever there is a case of crossing ships, it must surely be when one ship is going obliquely up and across the channel, and the other is going down the same channel. And that their courses were so crossing as to cause danger of collision is proved by the fact that they did come into collision. Our assessors' conclusion that the *Oceano* was to blame is one in which we entirely concur with them, and with the finding of the Court below.

There remains the other question. Was the *Virgo* to blame? Our assessors, after a very careful examination of the evidence, are unable to find any proof of this. The *Virgo* was keeping her course, as she well and properly might, near the south shore. She, in order to pass the craft at mooring, went out into the mid-stream, and then slightly ported to recover her course. There was nothing at that time to induce her or to call on her not to do this. She in good time eased and stopped her engines when she saw the *Oceano* approaching, and at the very last moment she ported hard. No doubt in doing this she did not literally comply with the rule as to keeping her course, viz., doing nothing. But our assessors are of opinion, and we see no reason for differing from them, that this last porting, when in the very jaws of the peril, was not only not blameable, but was forced on her by the right and duty of self preservation under such circumstances. And, in fact, this last porting, so far from contributing to the mischief, diminished it. Considering the size and power of the ships which came into collision, the blow was a singularly light one. That it was so slight is, in the judgment of our assessors, mainly to be attributed to the *Virgo* having so ported and having previously taken the timely precaution of diminishing, and, as far as could be, stopping her way through the water.

(1) Law Rep. 4 P. C. 519.

In concurring with the conclusion of our assessors we have not been unmindful of the very just observations which have been made to us on the evidence of the master of the *Virgo*. There is no doubt that, in saying that he saw the *Oceano* porting after she had starboarded to clear the brigantine, he said that which was not the fact. Whether he imagined that he saw, or thought after the collision that he recollected that he saw, the *Oceano* do what he expected she would have done, or whether it is an absolute misstatement, it is not necessary to say. But disregarding that evidence, and if necessary disregarding the whole of his evidence, there is sufficient in the facts otherwise proved and patent to compel us to come to the conclusion, differing in this respect from the Court below, that the *Oceano* has not proved, that which it was for her to prove, that the *Virgo* was to blame.

We must therefore vary the order appealed from, and pronounce that the *Oceano* was to blame, and that the *Virgo* was not to blame, and condemn the *Oceano* in the whole damage and the cost of the suits, both below and in this court.

Solicitor for appellants: *W. Batham.*
Solicitors for respondents: *Lowless & Co.*

MORRIS *v.* FREEMAN AND JANE FREEMAN, HIS WIFE.

June 25.

Costs—Married Woman.

In an action for probate which was tried by a jury, and in which the verdict was for the plaintiff:—

Held, that the Probate Division has power to condemn in costs the defendant, a married woman having general separate estate.

THE facts and arguments in this case sufficiently appear in the judgment.

June 18. *George Browne* and *Powles* appeared for the plaintiff. *Bayford* for the defendant, Jane Freeman.

Cur. adv. vult.

June 25. SIR JAMES HANNEN (President). This was an application to vary an order of this Court by striking out the direction for payment of costs by the female defendant.

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MORRIS v. FREEMAN.

This action was brought for the purpose of proving the will of one Sarah Morris, deceased. The defendant Jane Freeman, had entered a caveat against the proof of the said will; and upon that caveat being warned, and it appearing that it had been entered by Jane Freeman, she was made defendant in the action. At a subsequent stage of the cause, the registrar ordered that she be at liberty to amend her appearance by adding her husband as a party.

The case came on for trial on the 7th of July, 1876, and proof of the plaintiff's case having been given, a verdict was found for the plaintiff on all the issues. The Court accordingly pronounced in favour of the will.

The subject of costs in all the divisions of the High Court is now regulated by the 55th order, rule 1, "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court, but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs, out of a particular estate or fund, to which he would be entitled according to the rules hitherto acted upon in Courts of Equity. Provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shewn, the judge before whom such action or issue is tried, or the Court shall otherwise order."

As this action was tried by a jury, and as no cause was shewn why the costs should not follow the event, the defendants were condemned in costs, in accordance with the above rule.

The costs were subsequently taxed, and upon their amount being ascertained, an order for their payment, dated the 7th of March, 1877, was issued in the registry in pursuance of the practice of this division.

Application is now made to rescind this order so far as it affects the female defendant. And the application is based solely on the ground that she was a married woman at the time.

The grounds of objection to the order were not very distinctly stated, but they appear to rest on the supposition that the Court has no jurisdiction to condemn a married woman in costs. I am of opinion, however, that the Court has such a jurisdiction.

This subject, so far as relates to actions in the Courts of Common Law, was very fully considered in the case of *Newton and Wife* v. *Boodle* (1). In that case the plaintiffs, husband and wife, had failed in an action for alleged libel on the wife. Thereupon judgment was given for the defendants, and that they should recover their costs against both the plaintiffs. The wife was taken in execution for these costs, whereupon she and her husband brought an action for false imprisonment in respect of her arrest. The defendants pleaded justification under the judgment, and the capias issued to enforce it, and a verdict was found for the defendants. The plaintiffs afterwards moved for a new trial, and upon argument the rule was discharged with costs against both plaintiffs. Mrs. Newton then applied that the order on her to pay costs should be set aside, on the ground of her coverture, and the Court granted a rule, Wilde, C.J., saying that the attention of the Court had not been drawn to this point when the order was made. After elaborate argument, the Court refused to alter the order, and again condemned Mrs. Newton to pay the costs of her unsuccessful application, Wilde, C.J., saying, "It seems to me that if a married woman comes before the Court with an unfounded motion, she ought to be liable to costs. The rule will therefore be discharged with costs to be paid by Mrs. Newton. We need not now speculate upon what may be the result when the defendants seek to enforce the payment of their costs."

It appears from a note to the report, that a decree having been subsequently made by the then Master of the Rolls in favour of Mrs. Newton as to a sum of money claimed by her, the defendants obtained an order under 1 & 2 Vict. c. 110, s. 14, to charge her interest therein with costs.

This decision has ever since been acted upon without question in the common law courts.

Soon after the institution of the Court of Probate, this subject was considered by Sir C. Creswell in the case of *Clarkson* v. *Waterhouse* (2), and he condemned the plaintiff, a married woman, in costs, adding, "If the wife has no separate property, I do not know that the order can be enforced; if she has separate property, there may be some mode of getting the costs from her."

(1) 4 C. B. 359. (2) 2 Sw. & Tr. 378.

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Again, in the case of *Thomas* v. *Crowther* (1), where the plaintiffs, a married woman and her husband, failed to establish a will which they propounded, Sir C. Creswell condemned them both in costs, and made an order upon the female plaintiff to pay the costs to the defendant's proctor within seven days after the date of the order.

The order there was precisely similar to that which has been made in this case, and which I am now asked to set aside.

In the case of *Parker* v. *Hick* (2), the attention of Lord Penzance, then Sir J. P. Wilde, was directed to this subject. An order as in this case having been made on a married woman to pay costs, Dr. Spinks moved for an attachment against her.

The learned judge granted the attachment, saying, "If the defendant has no property she is not liable to attachment, but the onus of establishing that fact lies upon her, and as she has not thought fit to appear on this motion I shall allow the attachment to issue."

This goes further than is necessary as a precedent for the present order, as I have not been asked to issue any process for its enforcement.

These authorities were not needed to dispose of an argument which was addressed to me, founded on the 25th section of the Court of Probate Act, 1857, which enacts that the Court shall have the like powers, jurisdiction, and authority for certain specified purposes, "and generally for enforcing all orders, decrees, and judgments, made or given by the Court under this Act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the Court under this Act as are by law vested in the High Court of Chancery for such purposes, in relation to any suit or matter depending in such Court."

This has nothing whatever to do with the question whether the Court has power to make a particular decree—it only arms the Probate Court with the power of enforcing its decrees (which may, and usually do, relate to matters not within the jurisdiction of a Court of Equity), in the same way that the Court of Chancery could have enforced its own decrees.

I think that I have said enough to shew that the order now

(1) 2 Sw. & Tr. 501. (2) 3 Sw. & Tr. 436.

complained of is perfectly regular, and in accordance with the practice of this Court up to the time of the passing of the Judicature Act. As a matter of fact it has continued the same ever since, without objection. But I am informed that it has been said by a learned judge, for whose opinion I entertain the most profound respect, that such an order as this could not be made or enforced in the Chancery Division. Assuming that he meant that such an order ought not to be made in this division, I am compelled, however reluctantly, to differ from him. And in the absence of any judicial decision on the point, it is my duty to act on my own view of the law.

In the first place, I do not consider that the difference of practice between this division and the Chancery Division comes within the operation of s. 25, sub-s. 11 of the Judicature Act, 1873. The practice of the Court of Probate was not regulated by the common law except in the cases prescribed by the Act. As in s. 33 of 20 & 21 Vict. c. 77, with regard to evidence in all matters not expressly provided for by the Act, the practice of the prerogative court is to be adhered to—s. 29. But further, if it be that the judges in the Courts of Equity had no discretionary power to condemn a married woman in costs, then it appears to me that the Judicature Act has made a new departure on this subject for the Chancery Division as well as for the other division. And that as in the Common Law Division, costs are now in all cases, in the discretion of the Court (unless the case is tried by a jury) freed from the restraints of all the statutes on the subject, so in the Chancery Division a like discretion is given, freed from the restraints of its previous rules of practice, except in the cases specified in the section. And that a judge of that division is now at liberty to condemn a married woman in costs, if on general principles of justice it should appear right so to do. The exceptions of certain rules of equity as to costs from the operation of the section, shews by implication that all rules of equity as to costs not excepted, are abrogated, that is, as absolutely binding on the discretion of the Court, although their effect on the minds of the judges in the exercise of their discretion, will doubtless, still continue. As in the case of *The Daoiz* (1), the

(1) W. N. (1817), p. 93.

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Master of the Rolls, who delivered the judgment of the Court of Appeal applied the old rule of the Admiralty Court, that where an action is brought for damages caused by the collision of the defendant's ship with the plaintiff's, if the defendant succeeds on a plea that the damage was caused by the negligence of the pilot whom the defendant was compelled to employ, the defendant is entitled to no costs, while, on the other hand, the Exchequer Division, in a similar case, has adhered to the general rule of the Common Law Courts, that the successful party is entitled to costs. *General Steam Navigation Company* v. *London and Edinburgh Shipping Company.* (1)

I have no doubt that many reasons may exist for a difference of practice in the Chancery and the other divisions as to costs in actions to which married women may be parties, and indeed the circumstances of such actions must be so various, that I do not think it expedient to lay down any absolute rule as to the manner in which the discretionary power of this division should be exercised.

In the present case, as I have already pointed out, I had no discretion, because the action was tried by a jury, and no cause was shewn why the costs should not follow the event. Nor has any cause been now shewn why they should not, beyond the fact that the defendant was a married woman. On the other hand, it appears that the litigation was the result of the female defendant's own personal act, and it has been sworn and not denied, that she had at the time of the order, separate property without any restraint on anticipation; and that she is now a feme sole. For these reasons, I am of opinion that this application must be refused, and that the costs of the motion should be paid by the defendant, Mrs. Freeman.

Solicitor for plaintiff: *J. Holder.*
Solicitors for defendant: *Goldring & Jukes.*

(1) Law Rep. 2 Ex. D. 467.

IN THE GOODS OF CHARLES APTHORP WHEELWRIGHT, DECEASED. 1878
June 25.

Executrix—Universal Legatee—Remuneration.

H. P. W., sole executrix and universal legatee, renounced her rights as such to the grant of letters of administration, which was accordingly made to G. W., one of the next of kin. Upon the death of G. W., intestate and insolvent, H. P. W. was allowed to retract her renunciation as universal legatee, and take a grant of letters of administration de bonis non.

THE Rev. Charles Apthorp Wheelwright died, having by his will appointed his daughter, Henrietta Pretyman Wheelwright, sole executrix, and named her universal legatee.

The daughter, by reason of illness, renounced her right to the grant in both characters, and letters of administration, with the will annexed, were, on the 22nd of January, 1859, granted at the Peterborough District Registry to the Rev. George Wheelwright, a son of the testator, who intermeddled in the estate, and died on the 7th of December, 1875, intestate and insolvent. Some other property, of the value of about £200, having recently accrued to the testator's estate,

Pritchard, for Henrietta Pretyman Wheelwright, moved the Court to allow her to withdraw either her renunciation to the grant as executrix or as universal legatee. The words of the statute (20 & 21 Vict. c. 77, s. 79), that upon renunciation the rights shall cease, only apply to her as executrix, and there is nothing except rule 50 to prevent the Court from allowing her to withdraw her renunciation as universal legatee. The enforcing of that rule is in the discretion of the Court: *In the Goods of Gill* (1); *In the Goods of Badenach* (2).

SIR J. HANNEN (President). She has not renounced her beneficial rights as universal legatee. Let her take the grant in that character.

Solicitors: *Cobbold & Woolley.*

(1) Law Rep. 3 P. & D. 113. (2) 3 Sw. & Tr. 465.

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May 29.

S. *v.* A., OTHERWISE S.

Nullity—Non-Consummation—No structural Defect.

Wilful wrongful refusal of marital intercourse is not in itself sufficient to justify the Court in declaring a marriage null by reason of impotence.

When, after a reasonable time, it is shewn that there has been no sexual intercourse, and that the wife has resisted all attempts, the Court, if satisfied of the bona fides of the suit, will infer that the refusal arises from incapacity, and will pronounce a decree of nullity of marriage.

THIS was a suit for nullity of marriage by reason of the alleged impotence of the wife. The parties were married on the 8th of August, 1868, and lived together until the month of September, 1877. The other facts sufficiently appear in the judgment.

Dr. Spinks, Q.C., and *Searle*, appeared for the petitioner, and relied upon the case of *G.* v. *G.* (1)

Inderwick, Q.C., and *Bayford*, for the respondent. The application is not bonâ fide. The petitioner married her, in spite of her deformity, to obtain a small sum of money which she then possessed, and now seeks to get rid of her, not because she is malformed, which is not true, but because of her deformity. (2)

SIR J. HANNEN (President.) I am of opinion that this petition must be dismissed. It is a case in which the medical evidence established that each of the parties is perfectly capable of sexual intercourse, and the questions are, whether there has in fact ever been sexual intercourse between them, and if not, whose is the fault?

I have nothing to rely on but the evidence of the two parties. The petitioner alleges that the respondent would not allow him to have intercourse with her, such is the effect of his statement; and the respondent alleges that she did allow him on the first occasion that he chose, that she was always ready and willing at all times afterwards; and that on one occasion, and on one occasion only, he made an attempt which approached, if it did not actually reach, positive consummation.

It is to be borne in mind that the ground upon which the

(1) Law Rep. 2 P. & D. 287.

(2) The respondent was hump-backed and diminutive.

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Court proceeds in these cases is the physical incapacity of the parties. A wilful wrongful refusal of marital intercourse is not in itself sufficient to justify the Court in declaring a marriage to be null by reason of impotence. However much we may revolt from the idea of a man using force to compel his wife to have intercourse with him—and such a feeling is one which probably is much stronger at the present day than in past times—no case has gone the length of saying because a man naturally abstains from using force, that therefore the refusal, if it be a merely wilful refusal on the part of the wife, will justify him in coming to the Court and asking that it shall be declared that the marriage is void. Recent cases only establish this in advance of previous decisions, viz., that where a woman is shewn not to have had intercourse with her husband after a reasonable time for consummation of the marriage, if it appears that she has abstained from intercourse, and resisted her husband's attempts, the Court will draw the inference that that refusal on her part arises from incapacity. In the case of *G.* v. *G.* (1) the evidence of Dr. Farr, was to this effect,—"The result of my examination is, that sexual intercourse is practically impossible. There are means by which, in my opinion, her condition may be remedied; but in order that they should succeed it is necessary that she should lend herself to them." So that it being necessary that she should submit to some physical treatment, Lord Penzance, under the circumstances, was satisfied of the practical impossibility arising from the physical condition of the woman. In another case, a case of *P.* v. *L.*, *falsely called P.* (2), the evidence was as in the

(1) Law Rep. 2 P. & D. 287.

(2) Decided the 3rd of May, 1873, by Sir J. Hannen. The substance and effect of the pleadings and evidence in this case were as follows:—The petition alleged the marriage of the parties on the 5th of February, 1866, at Christ Church, Lee, in Kent, cohabitation until May, 1872, and the incapacity of the respondent, and her refusal to submit to remedies. The answer denied the incapacity and refusal. The petitioner said at the time of my marriage I was thirty, and the respondent eighteen. I attempted to consummate the marriage, but there appeared to be an obstruction. She screamed and became hysterical, and afterwards complained of pain and suffering. In appearance she seemed to be a child, and not a woman. I made other attempts, but she resisted me, and on one occasion hit me in the face. She also threatened to drown herself. In 1869 she left me. After a time I discovered where she was

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case of *G.* v. *G.* (1) that intercourse between the parties was practically impossible. There was no physical impossibility in the grosser sense of that expression, but it was proved to my satisfaction that the respondent was not really and truly in nature a woman—that she remained a child incapable of understanding the nature of the act: and that therefore being entirely free from the passions of women in that respect she resisted the action of her husband as though it were something unnatural. Those cases are totally different from the present. In the present case it is sufficient for me to say the medical evidence is complete, that the respondent's physical condition is in all respects suitable for connection, and as a matter of fact is such as would have been presented if there had been sexual intercourse, as she says there was on one or two occasions several years ago. That she has not the appearance of a married woman who has been accustomed to habitual sexual intercourse is consistent with either case.

In such a state of things, there being no proof except the evidence of the two parties, what is there to lead me to a conclusion in favour of the petitioner? I find nothing tending to corroborate his statement. It has been said that no motive has been suggested for the husband taking these proceedings. It is of course very difficult to penetrate men's minds, but taking his own statement, I must say that it does not impress me in favour of his case. It must be obvious to everybody that the fact that a woman

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living, and persuaded her to return. We lived together until 1872, when she left me and refused to return.

Dr. Hicks, M.D., said that at the request of the petitioner, he examined the respondent some time ago. The hymen was unchanged, and the parts were rather smaller than usual. She refused to submit to remedies. (There was also other medical testimony to the same effect.) She refused to be again examined by him or to submit to any remedies, and said that when she married she had no idea that there would be sexual intercourse—that she had no sexual desire.

The petitioner's sister and friends were called, with whom petitioner and respondent had stayed, and who tried to reason with her, but to no purpose. She said it was like the beasts of the field. She also admitted to them that there had been no consummation.

The medical report upon the husband shewed that his condition was normal.

Dr. Spinks, *Q.C.*, and *Searle*, appeared for the petitioner. The respondent did not appear.

Decree nisi.

(1) Law Rep. 2 P. & D. 287.

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on the first night of the marriage only should have refused her husband access to her would be a totally insufficient ground for his at once asserting that he "was a stupid for having married her." Supposing it were true that she had refused, he should have waited for another occasion, and should have trusted to the effect of their associating together as man and wife to produce a change in her feelings. But, on the other hand, an expression of that kind is quite consistent with a feeling of regret that he had entered into a marriage with a person whose appearance might not present the usual attractions of a bride.

This being the state of things, viz., the woman alleging that he did on that night have connection with her, her condition being consistent with such statement, and there being nothing upon which I can rely as corroborating his evidence rather than hers, it is my duty to take into account the fact that it is only after nine years' living together as husband and wife that he institutes these proceedings. I do not say that he ought to have done what it is alleged he originally said—that he ought to have taken these proceedings the next day—but he ought to have done so after a reasonable time. The law has indicated what is a reasonable time in requiring three years' cohabitation, by which is meant, that three years is a sufficient time to ascertain whether it is a mere coyness on the part of the woman or whether there is any physical incapacity. But he has lived with the respondent such a length of time that the conditions of her existence are changed, for nine years is a considerable period in anybody's life. It was his duty, if he felt he was subject to the wrong which he says he was, to have instituted these proceedings at a much earlier period, in order that it might have been judicially determined whether or no there had been a valid marriage between them. Without saying that the delay would in itself be a bar to the proceedings, I am bound to take it into account, in arriving at the conclusion whether or not the absence of ordinary conjugal intercourse is to be attributed to the man or the woman. The letter that has been written by the brother makes no impression whatever on my mind. Her allegation that the marriage was consummated on the first night was put forward by the solicitor promptly. The letter is the letter of a somewhat illiterate person, and the

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obvious meaning of it is, that she alleges that the fault was not hers but the man's, and whether or no the brother was right in the use of his expression about the marriage being "consummative," if the letter is looked at with unprejudiced eyes, all that the brother intended to say was, that the state of things which existed between them was alleged by the wife not to be her fault but the fault of the husband.

I therefore come to the conclusion that the petitioner has failed to make out his case, and the petition must be dismissed with costs.

Petition dismissed with costs.

Solicitor for petitioner: *J. M. Weightman.*
Solicitors for respondent: *Robinson & Co.*

May 27.

[IN THE COURT OF APPEAL.]

IN THE GOODS OF THARP.
THARP *v.* MACDONALD.
[1877 T. 4.]

Probate—Will of Married Woman—Separate Estate—Savings from Allowance to Wife of Lunatic—Judicature Act, 1873, *s.* 24, *sub-s.* 7.

When the will of a married woman is tendered for probate on the ground that she had separate property, and the probate is contested, if the Court is satisfied that there is separate property, it has power to grant probate of all such property as the testatrix had power to dispose of without deciding what that property is. But it is in general the duty of the Court, so far as the evidence and pleadings enable it to do so, to decide judicially of what such property consists.

And, *semble*, where the will is made under a power, if the Court has all persons interested before it, it ought to decide the question not only whether there is a power, but whether it is well executed.

The savings of an annual allowance for her separate maintenance, paid to the wife of a lunatic living apart from her husband, under an order in lunacy, are her separate property, although the order does not expressly state that the allowance is for her separate use.

THIS was an appeal from an order of Sir R. J. Phillimore, made on the 8th of November, 1877.

Lady Hannah Charlotte Tharp was married in 1815 to Mr. John

Tharp. A settlement was made on their marriage, but no power being given to the wife over the property settled, it did not affect the question in the present action.

On the 17th of January, 1816, Mr. Tharp was found lunatic by inquisition. By an order of the Lord Chancellor, dated the 24th of December, 1819, it was ordered that 4000*l.* a year should be allowed out of the income of the estate of Mr. Tharp "for the separate maintenance of his wife payable quarterly." The principal part of the lunatic's estates being in the West Indies subsequently became valueless, and on the 4th of November, 1826, another order was made in the matter of the lunacy, directing that instead of 4000*l.* a year, an allowance of 300*l.* "should be paid to Lady Mary Tharp out of the lunatic's English estates by half quarterly payments." It was not expressly stated in either of the orders that the allowance was to be for the separate use of Lady Hannah Tharp. This allowance the testatrix received till the time of her death. The only other source of income of Lady H. Tharp was an annuity of 500*l.* payable under a letter dated the 24th of April, 1822, from Lady Elizabeth Gavin, a relative of Lady Hannah Tharp living in Scotland, to her daughter, the Marchioness of Breadalbane, which was as follows:—

"Since writing the above, it appears that Lady Hannah Tharp, from the total ruin of Mr. Tharp's estates in the West Indies, is without a possibility of having anything to subsist on, and in the event of his death would have no jointure. I wish her to receive from what I shall leave you 500*l.* annually till she marries."

Under this letter, which was proved as a will, Lady Hannah Tharp after Lady E. Gavin's death received the annuity of 500*l.* during the remainder of her life.

Lady Hannah Tharp died on the 3rd of May, 1876, at Edinburgh, her husband being still alive and a lunatic domiciled in England. At the time of her death she had accumulated considerable savings out of her income amounting to about 20,000*l.* She made a will, dated the 29th of January, 1869, and six codicils, the last of which bore date the 11th of April, 1876, by which she appointed John Macdonald her executor. A very small portion of her property was in England, almost all being invested in the

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names of her trustees in Scotch securities and stocks. The trustees in June, 1877, commenced a suit of multiplepoinding in the Scotch Court for the purpose of ascertaining the title to the assets in Scotland. The committee of Mr. Tharp then commenced the present action in the Probate Division of the High Court of Justice to which Macdonald was made defendant, claiming that the will and codicils should be pronounced invalid, and that administration should be granted to the plaintiff as committee of her husband.

Macdonald, by his defence, maintained the validity of the will and codicils on the ground that Lady Hannah Tharp had property to her separate use, and by way of counter-claim, claimed that the will and codicils might be admitted to probate.

Sir R. Phillimore being of opinion that Lady Hannah Tharp, living apart from her husband by reason of the lunacy, had a right to accumulate savings out of the income allowed her by the Court as separate estate, made an order directing probate of the will and codicils limited to such effects as she had power to dispose of and had disposed of accordingly, but without referring specially to any of the funds.

From this order the plaintiff appealed.

Inderwick Q.C., and, *Dr. Swabey* (*R. A. Bayford*, with them), for the plaintiff. There is no proof that there is any separate property in respect of which the probate can be granted. With respect to the allowances made by the Court in the lunacy, it is not stated in the orders that the allowances are to be for Lady H. Tharp's separate use. *Brooke* v. *Brooke* (1), and *Barrack* v. *McCullock* (2), relied on by the other side, are not in point. Therefore the savings are not the separate property of the testatrix. Neither is there any proof that the savings of the annuity under the Scotch will are separate property. That question is now under litigation in the Scotch Court. At all events the grant of probate was irregular in not deciding what part of the property is separate property. In fact the judge refused to go into that question. Before the passing of the Judicature Act, 1873, the

(1) 25 Beav. 342. (2) 3 K. & J. 110, at p. 120.

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judge of the Probate Court used to hear evidence, and consider what separate property there was, although the practice was not clearly settled: *Haddon* v. *Fladgate* (1), *Re Elliott* (2). So also in the case of a will of a married woman made under a power, the Court considered the question whether there was a power, although it had no power to determine the question whether the power was well executed. And now the Judicature Act, 1873, s. 24, sub-s. 7, gives full power to every Division of the High Court to decide all questions between the parties, so that all matters may be finally determined and multiplicity of legal proceedings avoided. This power has been exercised by the Probate Division in a recent case of *Pledger* v. *Mant* (3), in which the judge heard and decided the question whether certain property was part of the separate estate of a married woman. That has not been done in the present case, and the plaintiff will have to take proceedings in the Chancery Division to determine what is separate property.

Southgate, Q.C., and *G. Browne*, for the defendants, were not called on.

JESSEL, M.R. This is an appeal from a decision of Sir Robert Phillimore, and it raises some questions of importance as to the practice of the Court of Probate, and also as to the right of the deceased Lady Hannah Charlotte Tharp to dispose by will as her separate estate of very considerable property. The executor propounded a will, which was no doubt perfectly valid to dispose of the separate estate of the lady, if she had any. The committee of the husband, who is a lunatic, opposed probate, and claimed grant of administration on the ground that she really had no separate estate, and therefore the contest between the parties really was whether there was any separate estate authorizing the Court of Probate to grant probate to the executor in the form in which it seems it is usually granted, "of such personal estate and effects as she had power to dispose of." Now, the point as to the practice of the Probate Court is this:—No doubt the old Ecclesiastical Court was in the habit of granting probate of a testamentary

(1) 1 Sw. & Tr. 48. (2) Law Rep. 2 P. & M. 275.
(3) Unreported.

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appointment of a married woman, without deciding the question as to whether the appointment was a valid one or not. In the Ecclesiastical Court, when there existed a power which enabled a married woman to dispose of property, and there was a question whether the power was well executed or not, the practice was to grant probate of the instrument in order to enable the Court of Equity, which as a general rule was the proper Court to decide upon the sufficiency of the execution, to decide the question. The Ecclesiastical Court was in this position, that it could not finally decide the question for itself. If it entertained the question, and decided to refuse the probate, it prevented the Court of Equity from deciding it. So that in one way it would have finally decided the question, whereas by adopting the other way they left the question of the effect of the probate to be decided by the Court of Equity, and accordingly this practice, which was affirmed by the Privy Council in the case of *Barnes* v. *Vincent* (1), sprung up. In all cases where it was a mere question of the sufficiency of the execution of the power, there the Court being satisfied that there was a power capable of being exercised, and there was some ground for disputing or fairly disputing the question as to the validity of its exercise, granted the probate in order to enable a Court of competent jurisdiction to decide the real question between the parties.

With regard to the question immediately before us, which is not a question of the grant of probate of a will of a married woman who has merely exercised a power, but where the allegation is not that she had a power properly so called, but had merely a right of testamentary disposition, as one of the incidents of property belonging to her for her separate use, it appears to me that different considerations arise. As far as I am aware, and I have asked for information which I do not possess myself, it does not appear that this exact question came before the Court previous to the passing of the Probate Act—that is, previous to the establishment of the Probate Court as distinguished from the old Ecclesiastical Court.

Three cases have been cited to us before the Probate Court, in all of which the judges decided that, as a fact, a married woman

(1) 5 Moo. P. C. 201.

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had some separate property. The three decisions—two of them reported, namely *Haddon* v. *Fladgate* (1) and *Re Elliott* (2), and one of them unreported—were made by three different judges who have sat in the Probate Court and have all actually decided the question that there was some property settled to the separate use. That seems to have been the position of matters at the time of the passing of the Judicature Act. As regards two of them, they were decisions before the Judicature Act, and as regards the other, which is unreported, it was a decision after the Judicature Act.

The question, therefore, is whether there was any established practice in the Court of Probate as to what should be done in the case of an allegation merely of the existence of separate estate. If there were any established practice at all, I should suppose it would have been in accordance with the decisions which I have referred to, before the Judicature Act: but as I understand from the learned registrar who has given us his assistance in this case, there really was no established practice as regards cases relating merely to the property given to the separate use of the married woman.

That being so, I wish to consider whether the Judicature Act has made any difference, and, in addition to that, what is the most convenient course to pursue. Of course, I take it in all these cases it is not sufficient that the judge should have jurisdiction; there is always another question whether he should exercise the jurisdiction conferred upon him or not. Now, if we look at the 6th and 7th sub-sections of the 24th section of the Judicature Act, 1873, I think it is plain that the meaning of the legislature was this, that whenever a subject of controversy arises in an action which can conveniently be determined between the parties to the action, the Court should, if possible, determine it so as to prevent further and needless litigation. That is the effect of the sections, although not the exact words of them.

Now, in the case of a contest in the Probate Division as to whether a married woman had separate property or not, it is obvious that there can be but two parties to that contest—the surviving husband and the executors propounding the testamentary

(1) 1 Sw. & Tr. 48. (2) Law Rep. 2 P. & M. 275.

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instrument of the married woman for probate. If the property is not settled to her separate use it belongs to the husband, and if it is it belongs to the executors, to be distributed according to the will, and in such contest in every court the executors would be entitled to represent, and would be the only persons entitled to represent, the legatees claiming under the testamentary instrument. Therefore, we have a suit so constituted that every person is before the Court whose interests can be affected by the decision of the judge in that suit. But, in addition to that, it appears to me that the decision of the question is absolutely involved in the granting of probate. The probate is granted of something which the married woman has power to dispose of. It is not too much to assume that the judge, somehow or other, is satisfied that she has something to dispose of, because, unless there is power or unless there is separate property, she has nothing to dispose of, the property being the husband's. I leave out of consideration the singular case of a will ex consensu viri, which is another exception. That being so, the natural thing for the Court to do is to decide the question between the parties, it being an element in the conclusion at which the judge arrives that probate shall be granted. It does not appear to me that the decision in *Barnes* v. *Vincent* (1) has anything whatever to do with the question we have to decide, and for these reasons: first of all, as I said before, it was decided at a time when the then Court of Probate, being an Ecclesiastical Court, was a Court of very limited jurisdiction, and could not decide the question of the sufficiency of the execution of the power; and, secondly, because in the case of testamentary powers it may happen, and it frequently does happen, that other persons besides the executors are entitled to be heard in addition to the husband or his legal personal representative; so that, in such a case you have not necessarily all parties before the Court. If you had, I think the same reason which now enables the Court to decide all questions arising in controversy between the parties fairly arising out of the suit, would apply to enable, and more than enable, to justify the Court in deciding the question of the valid execution of the power. If it had before it the only parties who were interested in the decision, it seems to me that the right course would be not

(1) 5 Moo. P. C. 201.

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to leave it open for the decision of another Court, but for the Court itself to decide and thus to carry out what appears to me to be the principles of the Judicature Act. But in the case of separate estate, all the parties being necessarily before the Court, if there is sufficient evidence before the Court of the existence of separate estate, it appears to me that the fact of there being such separate estate, ought to be then decided. But it does not follow that the Court is bound to decide as to every scrap of separate estate or as to the details of what it consists. It may happen that the Court, being satisfied that there is separate estate, finds it difficult, from want of evidence or from questions of foreign law being involved, to decide as to the existence of other portions of separate estate. In that case it does not appear to me that the Court is bound to wait for the decision of those questions, but may properly grant probate, leaving those other questions which cannot then be conveniently decided to be decided at a future period. I limit my observations as to the duty of the Court to decide questions, to those questions which are ready to be and can be conveniently and properly decided between the parties to the pending suit.

Now, applying those considerations to the case before us, what have we here? Lady Hannah Charlotte Tharp was for many years living separate from her husband by reason of the confirmed lunacy of her husband. The husband was under the care of the persons intrusted by sign manual with the care of lunatics, and was living under medical supervision, which necessarily made a complete separation between the husband and the wife. The wife was living alone in a house of her own. The Lord Chancellor in the first instance, and subsequently the Lords Justices for the time being intrusted with the sign manual, directed that a sum of money should be paid annually to the wife for her separate maintenance. The actual form of the order I take to be immaterial. The first order simply directed the consignees to pay the money for her separate maintenance, and that was carried out by the payment to her. The subsequent order of Lord Justice James directed the payment to be made to her, but that does not appear to me to be material. The substance of the order was that there should be an annual sum allowed her for her separate maintenance

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out of the husband's estate. Was this money her separate property in the sense of being settled to her separate use? I think it was; in fact, I should have said I have no doubt it was. It cannot be pretended that she was under any liability to expend it in any particular way for her maintenance. She might have bought furniture, or horses, or carriages, or things which would last for many years, intending to enjoy the things so purchased from year to year. She might have determined to buy in one year things which were to be paid for in the next, or to be paid for over a series of years. She might have bought a piano upon the well-known system by which the payments are distributed over a very considerable period of time. Is there any doubt or question that that property so acquired would have been her own separate property? In fact, in equity we are familiar with the two forms of allowance for maintenance. One is where the allowance is a sum certain for maintenance, that means that the sum is to be paid to the guardian or person entitled to receive the maintenance absolutely; and the other is where it is intended that no more shall be paid than that which is actually required, the form is to allow a sum not exceeding such a sum for maintenance. That is to avoid the inconvenience of having to call upon the payee to refund. In my opinion it is impossible to suppose that it was intended by the persons making these orders that there should be any refunding on the part of the receiver of the amount which she actually expended in the course of the year. As regards the right of the husband, his right was bound by the order of the judge, who had the control over the affairs of the lunacy precisely to the same extent as if the husband himself had been sane and made the allowance upon the same terms. That being so, there is authority precisely going to the extent that an allowance to the wife for her maintenance living separate from her husband becomes separate property and cannot be recovered by the husband during his lifetime, or by his representatives after his decease. It appears to me, therefore, that the only difference, if difference it be (and I am not sure there is a difference), between myself and the learned judge below, is that I think it clearly proved that this was property settled to the separate use of the wife, whereas he may perhaps have thought it was proved only primâ facie, subject to rebuttal.

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That being so, it seems to me that the granting of the probate was right. As to the form of it, it appears to be the settled practice that where one power is proved you grant the probate not only with reference to that particular power, but extend it to all the other powers possessed by the married woman. Following the analogy, if you found that the married woman had some estate settled to her separate use, you would grant probate generally to all property that she had power to dispose of, and which was settled to her separate use. Therefore it does not appear to me to be necessary to go further.

But in this instance another question has been raised; and following out the principles which I have enunciated, if I thought that question ready for decision, I should certainly now give my opinion upon it, so as to settle all matters between the parties; and then I think it would be convenient, if the Court had come to a decision upon all questions between the parties, that the order should recite what had been decided so as to conclude the parties, or if they did not elect to be concluded, to enable them to appeal from the order, or from so much of the order as contained what they thought was an erroneous recital.

The second question is this. It appears that Lady Elizabeth Gavin, a relative of the testatrix, wrote a letter dated the 24th of April, 1822, to her daughter, which, as the law then stood, was a good will. [His Lordship read the letter.] Now, if this were an English woman domiciled in England, looking at the circumstances of the case that, at the date when the letter was written, Lady Hannah Tharp was living separately from her husband, who was an incurable lunatic, and that the letter recites that she was without a possibility of anything to subsist upon, I should say that that annuity was left her for subsistence, and, consequently, would be for her separate use; but, inasmuch as it does not appear that Lady Elizabeth Gavin was domiciled in England, or that the will must be construed according to English law, I think that in the absence of evidence it would be improper to express a final opinion as to the effect of the bequest contained in that letter, and it must be left for the Court in Scotland to decide. If there were no other means of deciding it, I think it might not have been improper for the case to have stood over to

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have further evidence adduced before the Court of Probate as to the domicile of Lady Elizabeth Gavin, and also as to the law of Scotland if the domicile should be proved to be Scotch. I find that on the 20th of June, 1873, there was a multiplepoinding action raised in the Scotch Court, which is now pending, which will in fact determine this very question, for almost the entirety of the property of this lady is situate in Scotland, and the Scotch Court will therefore decide it directly, and it appears to me more convenient than the English Court deciding it; because if it turns out to be a Scotch domicile you will have a Scotch Court deciding upon the Scotch law, and that seems to me a better course where it can be pursued than sending it from England to the Scotch Court for the Scotch Court to determine as to the law. It seems to me that the most probable result will be that it is a Scotch domicile, and, therefore, looking to these circumstances, it seems to me it is more convenient to let the Scotch action proceed and the matter be determined there, and that we are not called upon to decide this additional question which it is not absolutely necessary to determine in order to affirm the grant of probate by the judge of the Court of Probate.

Under all the circumstances, it appears to me that the judgment of the Court below should be affirmed.

BAGGALLAY, L.J., after referring to the pleadings in the suit, and to the order in lunacy, proceeded as follows:—It appears to me impossible, having regard to the various decisions upon similar questions, to do otherwise than to hold that, so far as any portions of the accumulations of the allowance made to the testatrix for her separate maintenance were concerned, they were within the jurisdiction of the Court of Probate—that they were separate estate, in respect of which she had power to dispose not only in her lifetime, but by her will, and that as regards such property her will was a testamentary document which ought to have been admitted to probate.

An argument has been raised before us to the effect, if I rightly understand Mr. Inderwick's argument, that Sir R. Phillimore ought to have found in form and in terms that she had separate estate within the jurisdiction. I certainly read the order made

by the learned judge in the action as involving that statement. In the course of the argument before him, Mr. Inderwick having asked him to find as a fact that there was a primâ facie case of separate estate made out, there being an accumulation from her separate property, Sir Robert Phillimore is stated to have used these words: "Certainly I find that I grant probate upon this ground, that, primâ facie, she had a separate estate and power to bequeath it, and then I confine probate to such effects as she is found to have the power of disposing of." That is to say, having regard to the orders made in the lunacy, directing the payment of these sums of money to Lady Hannah Tharp for her separate estate, and to the payments made under them, there was a primâ facie case, and no case to rebut it nor any attempt to rebut it by evidence to the contrary effect. I think that Sir Robert Phillimore did in effect find that there was separate estate, and finding that there was separate estate he made the order against which the present appeal is brought.

As far as regards the other separate estate alleged to have resulted from the accumulation of the 500*l.* a year which this lady seems to have enjoyed under a certain letter addressed by Lady Elizabeth Gavin to her daughter, who was interested in her estate, requesting her to pay 500*l.* a year to this lady for the rest of her life, or until she should marry again, which was, in the result, for the rest of her life, I do not think we are called upon to express any opinion upon it. I think it would be very undesirable that the matter should come before the Scotch Court with the expression of any opinion of ours upon it. The accumulations from the other fund are sufficient to support the order which Sir Robert Phillimore made.

BRAMWELL, L.J. I think that this order should be affirmed. Upon the question whether there was any separate personal estate arising from the husband's money I shall say nothing, except that it seems to me that Mr. Inderwick's admission in the course of his argument, that if she had died indebted her creditors would have had a right to it, is almost fatal. I say no more upon that, and I say nothing about the property got from the Scotch lady.

I wish, however, to say that I have some doubt whether the

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learned judge upon the case presented to him could, and consequently whether he did, adjudicate finally upon the question of there being separate estate, so as to bind the parties to the litigation. I have no doubt, if the question had been properly presented to him, he would have had jurisdiction to do so, because every one of the divisions, and every judge, has now jurisdiction under the Judicature Act to do that which might be done by any other division or any other judge, and it seems to me that if the action could have been brought in the High Court for the purpose of having a declaration as to the title to this property, such a case as that might have been presented to the learned judge of the Probate Court, and he might have adjudicated upon it. But I have a doubt as to whether he could have done it upon the present materials, for this reason—all that is asked on behalf of the defendant is that probate of the will might be granted. Now the 7th sub-section of section 24 says that the High Court of Justice "shall have power to grant, and shall grant either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter." Now the legal and equitable claim brought before the Probate Division was the right to probate as it seems to me. The section then goes on to say, "so that as far as possible all matters *so* in controversy," not "all matters in controversy between the parties," but "so in controversy," and therefore you must look to what the claim is in order to see whether there is a controversy before you can determine upon what it is the learned judge can adjudicate. I doubt very much whether he could have adjudicated upon this case finally between the parties. Possibly if the pleadings had contained a prayer for a declaration as to the rights he might have done it, but I doubt very much whether he could have done it upon the pleadings as they stand, and I doubt, with all respect, whether he has done so. I doubt whether it would not be competent for any of Mr. Inderwick's clients to say, "There is no adjudication against me with respect to any particular property, and I am at liberty, therefore, to contest generally that it decides the case as to any parti-

cular property at all." But it would obviously be very convenient that there should be an adjudication as to the particular property because, supposing the learned judge to do what he seems to have thought he was bound to do and no more, that is to say, to grant probate, if there was a primâ facie case made out upon the case presented to him, this inconvenience follows,—that one tribunal half hears the question, if I may so say, and half decides it, holding that there is a primâ facie case; and another tribunal is to rehear that half, and to hear the other half to decide finally between the parties. It is obviously an inconvenience attended with expense for no good that I can see. But there is this to be said in favour of what the learned judge has done here, that in no one of the cases, where there has been an adjudication orally by the judge as to the rights between the parties, has the decree been drawn up in such a way as in my opinion to form an estoppel. All that has been done is to say that probate should be granted. I am satisfied that the judge was right in granting probate, and I doubt very much, upon the question presented by the pleadings and otherwise, whether more could have been done by the learned judge in the Court below.

JESSEL, M.R. The order may be drawn up in this form: This Court being of opinion that the savings of the allowance made to the testatrix under the lunacy form part of her separate estate, affirm the order of Sir R. Phillimore, without prejudice to any question as to the savings of the 500*l.* annuity.

Solicitors: *Bridger & Collins; Frere, Forster & Frere.*

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Feb. 25.

THE PRINCETON. (O. 55, Liv.)

Collision—Compulsory Pilotage in the Mersey—Mersey Docks Consolidation Act, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 128—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 388.

A duly qualified Liverpool pilot having been employed to pilot a ship from sea into the Mersey and take her into dock, piloted her over the bar, but owing to the state of the tide being unable to dock her that day, anchored her in a clear berth in the river. The pilot remained in charge of the ship, and the next day the state of the weather being such as to render it unadvisable to take her into dock that day, she remained at anchor. In the course of that day, and whilst the pilot was in charge, the ship dragged her anchor and came into collision with a barque. In an action instituted by the owner of the barque against the ship the Court decided that the collision was caused solely by the negligence of the pilot in charge of the ship:—

Held, that the owners of the ship were not answerable for the damage, for it was occasioned by the fault of a pilot acting in charge of the ship within a district where the employment of such pilot was compulsory by law.

THIS was an action of damage instituted on the 26th of January in this year on behalf of the owner of the Dutch barque, *Twee Zusters* against the American ship *Princeton*.

The statement of claim contained the following allegations:—

1. About 4.15 A.M. on the 25th of January, 1878, the *Twee Zusters*, of 375 tons register, was lying at anchor in a proper berth in the river Mersey. Her proper anchor lights were duly exhibited and burning brightly, and a proper watch was kept.

3. At such time the ship *Princeton*, which had been lying at anchor at a distance of about 150 fathoms and to the eastward and southward, was observed to have broken her sheer and to be driving partly athwart the tide, and to be approaching the port-bow of the *Twee Zusters*. Chain was thereupon paid out on both anchors, and the helm of the *Twee Zusters* was hard a-ported; but notwithstanding the *Princeton* drove foul of and carried away the jibboom and cathead of the *Twee Zusters*, and did other damage.

4. During the following flood the *Princeton*, although nearer to the *Twee Zusters* than on the previous flood, kept clear of the *Twee Zusters*, but at about 6 P.M., the tide being ebb and running about three knots an hour, and the wind being a gale from N.W. to N.N.W., and the *Twee Zusters* lying head up the river with a sheer to the westward, the *Princeton*, which had previously been observed to be ranging about, again broke her sheer and started, driving athwart the tide, and drove down upon the port bow of the *Twee Zusters*, and although the helm of the *Twee Zusters* was put hard-a-port, the *Princeton* with her starboard side struck the *Twee Zusters* on the port bow and did her considerable damage.

9. The said collisions and the damages consequent thereon were occasioned by the neglect or default of those on board the *Princeton*.

The defendants, the owners of the *Princeton*, delivered a statement of defence and counter-claim. Such statement denied the material facts alleged in the statement of claim, and, after setting forth the defendant's version of the facts and stating that the defendant's ship was in charge of a duly qualified pilot, proceeded as follows:—

10. The said collisions were occasioned by the negligence of the plaintiff or of those on board the *Twee Zusters*.

11. The defendants further say that if and so far as the said collisions or either of them respectively were or was occasioned by any neglect on the part of those on board the *Princeton*, such collisions respectively were solely occasioned by some default or incapacity on the part of the said pilot, who was a duly qualified pilot acting in charge of the *Princeton* within a district where the employment of such pilot was compulsory by law, within the true intent and meaning of s. 388 of the Merchant Shipping Act, 1854, and not by any neglect on the part of the master or crew of the *Princeton*.

By way of counter-claim the defendants rely upon the matters hereinbefore alleged, and say that by reason of the said collisions they have suffered great loss and damage.

Feb. 22, 23, 25. The case was heard before the judge, assisted by two of the Elder Brethren of the Trinity Corporation.

Butt, Q.C., and *Myburgh*, appeared for the plaintiff.

Milward, Q.C., and *E. C. Clarkson*, for the defendants.

Witnesses on behalf of the plaintiff and the defendants were examined orally in court. The following facts were proved by the witnesses called on behalf of the defendants.

The pilot who was on deck and in charge of the *Princeton* on the occasion of both the first and the second collision, and who remained in charge of her until she was taken into dock, was taken on board off the Orme's Head, in order to pilot her into the Mersey and into dock, and having taken charge of her, piloted her into the river, and brought her to anchor on the evening of the 24th of January, on the ebb tide, about an hour after high water. If the *Princeton* had arrived in the river before high water that evening she would have been docked that tide. On the 25th of January the weather was so rough that the master of the *Princeton*, after consultation with the pilot, determined not to dock on the morning tide. The *Princeton* was taken into dock on the 26th of January. The pilot of the *Princeton*, was paid for two extra days' detention in the river.

SIR ROBERT PHILLIMORE. One of the vessels that came into collision in this case was the *Twee Zusters*, a Dutch vessel of 375 tons register, and heavily laden. She had anchored on the

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23rd of January in this year, in a proper berth, in the river Mersey, to the westward of mid-river, and had dropped both her anchors, the starboard one with forty-five fathoms of chain and the port one with sixty fathoms of chain. The other vessel was an American ship called the *Princeton*, of no less than 1349 tons register, and laden with a cargo of cotton. Previous to the collision she was lying in a proper berth abreast of the Bramley-Moore Dock, where she had dropped her starboard bower anchor with seventy fathoms of chain. The *Twee Zusters* had anchored twenty-four hours earlier than the *Princeton*. It was admitted, and was proved by the evidence in this case, that in coming to anchor neither of the vessels gave the other a foul berth, there having been at that time at least a distance of a cable's length between them; but, nevertheless, they came into collision twice. It is admitted that whichever of the two vessels was to blame for the first collision was to blame for the second, because the giving of a foul berth, which caused the first collision, was the occasion of the second collision. The first collision occurred by the jibboom of the *Twee Zusters* coming into contact with the starboard side of the *Princeton*, and, on the evidence, it is plain that the collision must have been caused by one of the two vessels dragging on the ebb tide; the wind at the time blowing in the opposite direction to the set of the tide.

The main question which the Court has discussed with the Elder Brethren is, which of the two vessels dragged? After careful consideration of the evidence, which is contradictory on the point, we think that on the whole it establishes that the *Twee Zusters* remained at her anchors, and that the *Princeton* drove down upon her. We are clearly of opinion that the pilot in charge of the *Princeton* ought to have let go the second anchor as a precaution which the state of the weather imperatively demanded. We think that the collision was caused by the dragging of the anchor of the *Princeton*, to prevent which proper measures were not taken. I therefore pronounce the *Princeton* alone to blame.

Butt, Q.C., on behalf of the plaintiff, then submitted that as no evidence had been given to prove that any report had been made to the pilot that the *Princeton* was dragging, that the master and crew of the *Princeton* were to blame for the collision, and

that the defendants had not proved the 11th paragraph of the defence.

SIR ROBERT PHILLIMORE. The Elder Brethren are clearly of opinion that the pilot of the *Princeton* ought himself to have seen that the *Princeton* was dragging her anchor and to have ordered the second anchor to be dropped. I decide, therefore, that the collisions were solely attributable to the negligence of the pilot in charge of the *Princeton*.

The question whether the pilot of the *Princeton* had been at the time of the collisions in charge of the *Princeton* by compulsion of law was then argued by counsel.

Butt, Q.C., and *Myburgh*, for the plaintiff. The only enactment now in force which deals with the question of compulsory pilotage in the Mersey is the Mersey Docks Consolidation Act, 1858, and the combined effect of the 128th, the 130th, and the 138th sections of that Act (1) is, that the masters of all inward bound vessels other than coasting vessels in ballast or under the burden of 100 tons, are bound by compulsion of law to employ a licensed pilot

(1) 21 & 22 Vict. c. xcii., s. 128: "The pilot in charge of any inward bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some of the wet docks within the port of Liverpool, whether belonging to the board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey, and before going into dock, in which case he shall be entitled to receive five shillings per day for such attendance."

Sect. 130: "In case the master of any inward bound vessel other than a coasting vessel in ballast or under the burden of one hundred tons shall refuse to take on board or employ a pilot, such pilot having offered his services for that purpose, such master shall pay to such pilot . . . the full pilotage rates which would have been payable to him if he had actually piloted such vessel into the port of Liverpool."

Sect. 138: "If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at Hoylake or in the river Mersey, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of five shillings and no more, provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river; but no such charge shall be made for the day on which such vessel, being outward bound, shall leave the river Mersey to commence her voyage, or being inward bound shall enter the river Mersey."

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to pilot them into the Mersey, or into dock, but that they are not bound to employ any pilot at all on any day after the day of their arrival in the river. In the case of an inward bound vessel, the compulsion to employ a pilot ceases as soon as the vessel has been brought to an anchor, or at least at the end of the day of her arrival in the river, and the employment of a pilot does not again become compulsory until the vessel is actually in motion on her way to her dock: *The Annapolis* (1); *The Woburn Abbey.* (2) It is in evidence that the pilot of the *Princeton* was paid the extra sum of 5*s.* a day in respect of his detention on board the *Princeton* after she had come to her berth. This extra payment was made in pursuance of the provisions of the first part of the 138th section above referred to, and it is clear from the judgment of the Judicial Committee of the Privy Council in the recent case of *The City of Cambridge* (3), that the provisions with respect to extra payments in that section relate to voluntary pilotage only.

The policy of the law is not in favour of compulsory pilotage, and statutes relating to it must be strictly construed. If the contention of the defendants that pilotage was compulsory in this case is a right contention, it would equally hold that however long the *Princeton* might have remained in the river without docking, so long her owners would be exempted from all liability provided she was placed under the charge of a qualified pilot, all of whose orders were obeyed.

Milward, Q.C., and *E. C. Clarkson*, for the defendants. It is unnecessary for the defendants to contend that however long might have been the interval between the *Princeton's* entering the river and her going into dock, her owners would still be successful on a plea of compulsory pilotage. It is enough for them to shew that in the present case the pilot of the *Princeton* was employed to perform an entire duty, to pilot the *Princeton* into the Mersey and take her into dock, and that the collisions occurred during the performance of that duty. It cannot be that the defendants are to be held liable because through accidental circumstances the actual docking has not been completed as soon as it otherwise would have been.

(1) Lush. 295. (2) 38 L. J. (Adm.) 28.
(3) Law Rep. 5 P. C. 451.

It is clear, on the evidence, that it was from accidental circumstances that the *Princeton* was not docked on the day of her arrival in the river. She was prevented from being docked before the collision by the lateness of her arrival on the 23rd of January and the state of the weather on the morning of the 24th of January. There is, therefore, a strong analogy between the circumstances of this case and those of the case of the *City of Cambridge* (1). In the present case the detention of the *Princeton* in the river was a step in her progress into dock, and the *Princeton* being still in itinere to her dock it must follow that she had not at the time of these collisions ceased to be liable to compulsory pilotage.

Myburgh, in reply.

SIR ROBERT PHILLIMORE. I must take as facts to which the law is to be applied in this case that a duly qualified Liverpool pilot was taken on board the *Princeton* under an engagement to pilot that vessel to her mooring place, and subsequently to take her into dock, and that in the discharge of that engagement the pilot had moored her for the night, meaning to take her on the next day into dock. That on the next morning the weather was such as in his judgment to render it unsafe to proceed that day into dock, and that he so advised the master, and, in consequence, the vessel did not go into dock. On that day the collisions happened. The question arises, whether, having regard to the provisions of the Mersey Docks Consolidation Act, 1858, and especially to the provisions of the 128th and the 138th sections, the *Princeton* remained under the charge of her pilot by compulsion of law during the interval between coming to anchor and docking.

It is not necessary that I should do more than refer to the cases of *The Annapolis* (2), *The Woburn Abbey* (3), and *The City of Cambridge* (4), in support of the view I take. Looking at the principle to be extracted from those cases, and giving a reasonable interpretation to the 138th section of the Act of Parliament I have referred to, I am of opinion that the *Princeton* was, when the

(1) Law Rep. 5 P. C. 451.
(2) Lush. 295.
(3) 38 L. J. (Adm.) 28.
(4) Law Rep. 4 A. & E. 161; 5 P. C. 451.

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collision occurred, still under the charge of a compulsory pilot who had been taken on board by compulsion of law. To hold otherwise would be, in my opinion, to put a harsh construction on the statute. The ship was in itinere, and in her progress to dock, at the time when she came into collision with the *Twee Zusters*. There was no discontinuance of the engagement of the pilot, or the substitution of a voluntary for a compulsory service.

The circumstances of the case are, it must be remembered, that this vessel was compelled to remain where she was by vis major. If she could have gone into dock, but did not do so, I am not prepared to say I should consider that she was entitled to the immunity which I am of opinion in the circumstances she is entitled to. My decision in this case entirely depends on the special facts before me. I think that the pilot was still in charge of the vessel at the time of the collisions. With regard to the contention that the sum of 5*s.* a day received by the pilot was a voluntary pilotage charge, that argument has already been disposed of by the judgment of the Judicial Committee of the Privy Council in the case of *The City of Cambridge* (1), and the reception of it would not affect the construction I put upon the Act. I pronounce that the *Princeton* was under the charge of a pilot taken on board by compulsion of law and employed under compulsion of law at the time the collisions with the *Twee Zusters* happened. There will be no costs on either side.

Solicitors for plaintiff: *Bateson & Co.*
Solicitors for defendants: *Duncan, Hill, & Dickinson.*

(1) Law Rep. 4 A. & E. 161; 5 P. C. 451.

THE WILLIAMINA, PROCEEDED AGAINST AS THE WILHELMINA. (O. 184.)

1878
Feb. 26.

Collision — Admission of Liability — Reference to Registrar and Merchants — County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict.*, *c.* 71), *s.* 9— *Certificate for Costs.*

The defendants in an action for damage, before any statement of claim had been delivered, admitted their liability for the damage proceeded for, and by consent the question of amount was by an order of court referred to the registrar and merchants to report thereon. At the reference before the registrar the plaintiffs claimed as damages 295*l.* 18*s.* 1*d.* The registrar reported to the Court that there was due to the plaintiffs 199*l.* 18*s.* 6*d.*

Afterwards the plaintiffs moved the judge to condemn the defendants in the costs of the action and of the reference. Evidence was given on affidavit in support of the motion to the effect that the plaintiffs at the time their action was instituted were liable to a claim for salvage in respect of services rendered to their vessel after the collision, and that subsequently and before the reference 60*l.* had been paid and accepted in settlement of such claim:—

Held, that the Court had jurisdiction to certify that the case was a fit case to be tried before it, and that the proper order to be made was that the plaintiffs should have the costs of the action, but that each party should bear their own costs of the reference.

THIS was an action of damage instituted on the 31st of May, 1877, on behalf of the owners of the *Yandew* against the *Williamina*, proceeded against as the *Wilhelmina*, in the sum of 600*l.* On the 4th of June in the same year the owners of the *Williamina* appeared in the action. On the 13th of June the plaintiffs' preliminary act was filed, but the defendants having decided to admit liability for the damage proceeded for in the action, consented that the amount of such damage should be referred to the registrar assisted by merchants, and on the 4th of July, before any statement of claim had been delivered, an order of court was drawn up by consent referring the question of amount to the registrar assisted by merchants to report thereon.

The plaintiffs then filed their claim in the registry, and thereby claimed to recover as damages the sum of 295*l.* 18*s.* 1*d.* On the 10th of January in this year the reference came on to be heard, and after hearing counsel for the plaintiffs and the defendants, the registrar, on the 19th of January, reported to the Court that there was due to the plaintiffs the sum of 199*l.* 18*s.* 6*d.*, together with interest.

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Feb. 26. *E. C. Clarkson*, on behalf of the plaintiffs, moved the judge in court to condemn the defendants in the costs of the action and of the reference. He referred to the County Court Admiralty Jurisdiction Act, 1868, s. 9 (1), and relied on an affidavit filed in support of the motion, which stated in effect that in consequence of injuries sustained in the collision with the *Williamina*, the *Yandew* had been forced to accept salvage assistance from a steam-tug; that at the time of the institution of the present action against the *Williamina* the owners of the steam-tug had made a claim of 100*l.* as salvage remuneration in respect of the salvage assistance so rendered; that negotiations had afterwards taken place between the salvors and the defendants, and that ultimately and before the claim in the reference had been filed, the salvors had been paid and had accepted the sum of 60*l.* in settlement of their claim. (2)

G. Bruce, on behalf of the defendants, opposed the motion. The Court has no jurisdiction to entertain the motion. The provisions of the 9th section of the County Courts Admiralty Jurisdiction Act, 1868, have not conferred on the Court a general power to certify for costs in every case, but only enable the Court to grant a certificate where the action in respect of which the certificate is sought has been tried or heard before it. Now, in the present case, there has been no trial or hearing. It was not intended to give the Court power to certify except in cases of contested liability, where an opportunity has been afforded to the Court of judging by circumstances disclosed at the trial whether the action was fit to be brought in the High Court. Moreover, even

(1) 31 & 32 Vict. c. 71, s. 9, provides as follows: If any person shall take in the High Court of Admiralty of England or in any superior Court proceedings which he might without agreement have taken in a county court, except by order of the judge of the High Court of Admiralty . . . or of a county court having Admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in that Admiralty cause is limited by this Act, . . . he shall not be entitled to costs and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty or of a superior Court before whom the cause is *tried or heard*, shall certify that it was a proper Admiralty cause to be tried in the High Court of Admiralty of England, or in a superior Court.

(2) The plaintiffs' claim that the reference contained no item in respect of the above-mentioned salvage claim.

if the Court had the power to grant the plaintiffs' motion, it would not do so in the circumstances of the case. It is submitted that an undefended action is fit to be brought in the county court. Having regard to the great difference in the amount claimed by the plaintiffs and the amount actually allowed by the registrar, the Court should refuse to certify. In any event the defendants, according to the established practice, are entitled to the costs of the reference because a sum equal to within an insignificant amount of one-third of the claim has been disallowed: *The Empress Eugenie.* (1)

Clarkson, in reply. The Court has power to give a certificate under the provisions of the section, whenever it is of opinion that the action was a proper action to have been brought in the Admiralty Division. It is immaterial that the damages have been assessed by an officer of the court, and not by the judge himself. A certificate for costs ought to be granted in the present case, as the plaintiffs at the time they took proceedings here had good reason to suppose that the actual damages sustained in the collision would, together with consequential damages which the defendants might have been held liable to pay by reason of the salvage services rendered by the *Yandew*, exceed the sum of 300*l.*, in which case no application for costs against the defendants would have been necessary.

SIR ROBERT PHILLIMORE. I think I have jurisdiction to certify that this case was a fit one to be tried in the High Court, and to make an order as to the costs of the action and of the reference. I think that the plaintiffs before the salvage claim had been disposed of were warranted in bringing their action here, inasmuch as the salvage claim, arising as it did out of the collision, if not paid, would have been recoverable from the defendants as consequential damages in the collision action. I think it was, in the circumstances, a reasonable expectation on the part of the plaintiffs that the damage would exceed 300*l.*, the amount to which in actions of damage the jurisdiction of county courts having Admiralty jurisdiction is limited; but I do not think it was right on the part of the plaintiffs, after the salvage claim had been

(1) Lush, 138.

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settled, to claim the amount of damages which they claimed before the registrar, and I shall take this course: I shall give the plaintiffs the costs of the action, and I shall make no order as to the costs before the registrar.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Cooper & Co.*

Feb. 26.

THE FALCON. (H. 53.)

Jurisdiction to entertain County Court Appeal—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 31.

By a decree of the City of London Court an action of damage instituted in that court in the sum of 30*l.* was, after having been heard on the merits, dismissed with costs. The plaintiff appealed. At the hearing of the appeal the respondent objected to the jurisdiction of the Court to entertain the appeal.

The Court dismissed the appeal on the ground that as the appellant, if successful, could not have recovered more than 30*l.* in the action, he was precluded from appealing by the 31st section of the County Courts Admiralty Jurisdiction Act, 1868.

THIS was an appeal from the City of London Court in an action of damage instituted on behalf of the owner of the dumb-barge *Bromley* against the steamship *Falcon* in the sum of 30*l.* At the hearing of the action in the City of London Court the judge of the City of London Court, after hearing the evidence of the witnesses for the plaintiff and the defendant, dismissed the action with costs. From this judgment the owner of the *Bromley* appealed.

Feb. 26. On the appeal being called on the counsel for the respondent, defendant below, objected to the jurisdiction of the Court to entertain the appeal.

The question of jurisdiction was then argued by counsel.

E. C. Clarkson and *Charles Hall*, on behalf of the respondent. The 26th section of the County Courts Admiralty Jurisdiction Act, 1868, must be read together with the provisions of the 31st section of the same Act. The latter section provides that no

appeal under the Act shall be allowed unless the amount decreed or ordered by the Court appealed from to be due shall exceed the sum of 50*l.* The intention of the legislature in enacting this latter section must obviously have been to allow no appeal in any case where the amount either decreed to be due, or in respect of which a decree could have been made was an amount under 50*l.*

E. Clarke and *Safford*, for the appellant, in support of the jurisdiction. The cases of *The Doctor Van Thunnen Tellow* (1) and *The Elizabeth* (2) certainly shew that the 31st section of the County Court Admiralty Jurisdiction Act, 1868, as restricting the general right of appeal previously given by the 26th section of the Act, ought to be strictly construed, and its provisions not extended beyond the literal meaning of the words used. The construction contended for by the respondent can only be arrived at by inserting in the 31st section words which the legislature may designedly have omitted.

Clarkson, in reply.

SIR ROBERT PHILLIMORE. In this case the appellant, who was the plaintiff in the City of London Court, has failed in his suit in that court. He entered his action for 30*l.*, and the judge of the City of London Court decided against him. The question is, whether taking the true construction of the 31st section of the County Court Admiralty Jurisdiction Act, 1868, into consideration he has or has not the right to appeal. These are the words of the section: "No appeal shall be allowed unless the amount decreed or ordered to be due shall exceed the sum of 50*l.*" I have no hesitation in saying that it appears to me that the whole purport of this statute shews it to have been the intention of the statute to exclude appeals where the sum sought to be recovered is under 50*l.*

The question is whether that construction can be put upon these words. Upon this question I will refer to two cases that have been cited. The case of *The Doctor Van Thunnen Tellow* (1) is one, the other is the case of *The Elizabeth.* (2) I have no note of my judgment in the case of *The Doctor Van Thunnen Tellow* (1),

(1) 3 Mar. Law Cas. 244; 17 W. R. 899. (2) Law Rep. 3 A. & E. 33.

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but in the judgment in that case, as reported in the Maritime Law Cases, I am represented to have said:

> The enactment is badly drawn, but in my opinion the 31st section must be held to apply to appeals where an amount has been decreed to be due—that is to say, to appeals by defendants only. (1)

It is clear that was an extra-judicial dictum, and not necessary for the decision of that case. At all events, after giving the best construction I can to the section, I am bound to decide this question: Can the plaintiff in this case, who has entered his action in 30*l.*, appeal from the decision of the judge of the City of London Court to this court? I fully see the difficulty in the way of putting a satisfactory construction on the section in question, but looking to the whole purport of the Act, and endeavouring to construe the section to the best of my ability, and having a strong opinion that it was the intention of the legislature to exclude all appeals where the sum sought to be recovered did not exceed 50*l.*, I think that I must rule that there is no appeal in this case. I do so on the ground that the plaintiff having brought his action for 30*l.* could by no process whatever have got a decree or order for an amount which would have exceeded 30*l.* I do not disguise from myself the difficulty of the construction of the statute; but, upon the whole, I think that the construction I have placed on it is the reasonable construction to arrive at. I give no costs because the case is one of considerable difficulty.

Appeal dismissed.

Solicitor for appellant: *Preston.*

Solicitor for respondent: *Batham.*

(1) These words, "that is to say, appeals by defendants" do not occur in the judgment of the case, as reported in the Weekly Reporter, vol. 17, p. 899.

[IN THE ARCHES COURT OF CANTERBURY.]

1878
Nov. 2.

THE OFFICE OF THE JUDGE PROMOTED BY COMBE *v.* EDWARDS.

Church Discipline Act (3 & 4 *Vict. c.* 86)—*Disobedience to Monition*—*Suspension ab officio et beneficio for Contumacy.*

In a criminal suit articles, which charged the vicar of a parish with having offended against the laws ecclesiastical by several illegal ceremonial acts and observances during the celebration of divine service in his parish church, were held to be duly proved, and the defendant was ordered to file in the registry a declaration stating whether he would in future abstain from the matters set forth in the articles, with intimation that should he repeat the same and not abstain therefrom, the Court would proceed as by law directed. The defendant did not file any such declaration, and afterwards repeated certain of the matters set forth in the articles. On proof of the repetition of the said last-mentioned matters, the Court, on motion by the promoter and without fresh articles being exhibited, suspended the defendant ab officio et a beneficio for six months. Afterwards the promoter proved by affidavit that the defendant, subsequently to the date of the sentence of suspension, had officiated in his parish church and had repeated certain of the matters before complained of, and moved the Court to enforce the sentence of suspension.

Before the motion was disposed of the Queen's Bench Division of the High Court of Justice prohibited the Dean of Arches from enforcing a decree of suspension, in a similar case. The Dean of Arches, in deference to the decision of the Queen's Bench Division, though strongly dissenting from it, ordered the motion to stand over.

In a suit by letters of request, under the Church Discipline Act, promoted by a parishioner of Prestbury, against the Rev. John Edwards, the younger, vicar of Prestbury, articles were exhibited against the defendant charging him with having offended against the laws ecclesiastical by several illegal ceremonial acts and observances during the celebration of divine service in the parish church of Prestbury, between the 2nd of February and the 8th of June, 1873. (1)

On the 17th of July, 1877, the Dean of Arches pronounced that the contents of certain of the articles had been proved, and that the defendant had offended against the statute law and the laws and canons of the Church of England in the particular matters and practices set forth on the articles so proved; and assigned the

(1) See *Combe* v. *Edwards*, Law Rep. 4 A. & E. 390; 2 P. D. 354, where a detailed account of the proceedings is given, and where the minute of the decree is set forth at length.

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proctor for the defendant to file in the registry within a month a declaration under the hand of the defendant stating whether the defendant would in future abstain from the matters set forth in the articles so proved, with intimation that should the defendant repeat the same and not abstain and refrain therefrom the Court would proceed as by law directed.

No declaration in accordance with this decree was ever filed, and on or about the 14th of March, 1878, the proctors for the promoter brought in an affidavit alleging in effect that on Sunday, the 10th of March, 1878, the defendant had officiated as principal minister in the communion service in the parish church of Prestbury, and had then and there repeated certain of the matters and practices set forth in those articles which as above-stated, the Court had on the 17th of July, 1877, pronounced to have been sufficiently proved.

On the 23rd of the same month counsel on behalf of the promoter moved the judge in Court (1) to decree a suspension to issue in the suit, and the Court, evidence having been given that notice of the motion and a copy of the above-mentioned affidavit had been duly served on the defendant, declared the defendant suspended, and suspended him for the space of six months from the time of publishing the suspension from all "discharge and function of his clerical office and the execution thereof, that is to say, from preaching the Word of God and administering the Sacraments and celebrating all other duties and offices in the said parish church of Prestbury and parish of Prestbury and elsewhere within the province of Canterbury, and from receiving or taking any of the profits and benefits of the said parish or benefice, or of the fruits, tithes, profits, rents, rent-charges, salaries, fees, or other ecclesiastical dues and emoluments whatsoever belonging to the said parish and church," and further directed that the sentence should be published in the parish of Prestbury on the 31st of March, 1878. The judge further admonished the defendant to abstain for the future from the matters and practices set forth in such of the articles as had been proved.

On the 29th of March a suspension and a monition, both under the seal of the Court, were taken out by the proctors for the pro-

(1) The Court sat within the precincts of Lambeth Palace.

moter, and on Sunday, the 31st of March, previously to the commencement of morning service, the suspension was published by affixing the original suspension for a short time on the principal door of the parish church of Prestbury, and by leaving affixed there a copy thereof. On the same 31st of March the suspension and the above-mentioned monition were duly and personally served on the defendant.

June 12. *Dr. Deane, Q.C.*, and *Blakesley*, on behalf of the promoter, moved the judge in Court to declare that the defendant had disregarded and disobeyed the suspension and monition, and to pronounce that the defendant had been guilty of manifest contumacy, and further to direct the said suspension and monition to be enforced as to the Court might seem meet. (1)

The defendant did not appear, and proof was given that the notice of motion and a copy of an affidavit made by the promoter and another parishioner in support of the motion had been personally served on the defendant.

The last-mentioned affidavit was admitted in evidence, and it stated in effect that on Sunday, the 26th of May, 1878, subsequently to the publication of the suspension and the service on the defendant of the suspension and the monition above-mentioned and whilst the defendant was suspended, the defendant officiated as minister in the parish church of Prestbury at the communion service, and also whilst so officiating in the said church then and there repeated certain matters and practices set forth in the affidavit, which were repetitions of the matters and practices set forth in certain of the articles which the Court had on the 17th of July, 1877, pronounced to have been proved, and from which matters and practices the defendant had been admonished by the said monition to abstain.

LORD PENZANCE. The defendant in this suit had articles exhibited against him charging him with the use of certain vestments, and rites and ceremonies in the course of performing

(1) A similar application had been made on behalf of the promoter on the 11th of May, but in consequence of some informality as to the proof of the service of notice of the application on the defendant no decree was then drawn up.

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divine service, which were contrary to ecclesiastical law. The offences charged, or some of them, were declared by the Court to have been proved, and the defendant was invited to file a declaration under his hand stating that he would abstain from the practices complained of in future. He failed to comply with this requisition, and he repeated the original offences. This was brought to the notice of the Court, the facts being proved by affidavit. Mr. Edwards did not appear, and did not contest the truth of the facts. The Court having thus before it the fact that Mr. Edwards had committed an ecclesiastical offence in his departure from the authorized rites and ceremonies of the Church, and refused to avail himself of the opportunity which the Court had given him of undertaking not to break the law in future, pronounced against him a decree of suspension for six months. This was on the 23rd day of March, 1878.

The present application, of which Mr. Edwards has had due notice, with a copy of the affidavit, is founded upon an affidavit shewing that Mr. Edwards has since the case was last before the Court continued to perform divine service, notwithstanding his suspension, and has continued the practices complained of.

In these circumstances, the Court having exhausted the more lenient censures which it had at its disposal for correcting and restraining Mr. Edwards' conduct, can now only have recourse to the powers accorded to it by the statute 53 Geo. 3, c. 127, and by signifying his contempt to the Court of Chancery subject him to imprisonment, unless indeed it were prepared to pass a sentence of deprivation and thereby deprive him of his benefice altogether. And, accordingly, I should have been prepared to order a "significavit" to issue in this case but for an incident which I am about to mention.

A few days ago I was served as judge of this Court with a rule, ordered by the Queen's Bench Division, to shew cause why a prohibition should not be issued to this Court, prohibiting it from taking further proceedings to enforce a decree of suspension which it had pronounced, under very similar circumstances to those of the present case, against a gentleman named Mackonochie, upon the ground that this Court had no jurisdiction to pronounce such a sentence. I do not infer more from this than that the Queen's

Bench Division considers the question of the powers of this Court in such a matter to be a fair subject of argument. But putting it no higher than this, it is I think my duty (for the present at least) to forbear taking any further steps to enforce the decree of suspension which has been issued against the present defendant. I regret that this should be the case, and that Mr. Edwards should for the present be able to pursue his illegal courses unchecked; but I fail to see that I could take any different step in the matter consistently with the respect which I owe to, and feel for, the Court by which the above rule has been granted.

I may, however, fairly, and perhaps profitably, take this occasion to consider this question of jurisdiction which I regret to say has never been argued before me. It is indeed a matter to be regretted that in many of these late prosecutions relating to ritual the defendants have adopted the course of not appearing and arguing their objections in this Court, thereby giving the Court the assistance which the discoveries of ingenuity and research could not fail to afford to it, but have waited till the Court has acted, and then addressed their arguments to another tribunal. This is what took place in the case of Mr. Mackonochie, and this Court, having heard no arguments on the part of the defendant in that case in answer to those advanced by the promoter of the suit, did not in giving judgment think it necessary to enter at all into the question of its powers or jurisdiction. Had it been otherwise, I should have been prepared to state somewhat at length the view which I take of the ecclesiastical law on this subject.

The question, as I understand it is this: Whether in a suit in which certain ecclesiastical offences have been charged in regular articles against the defendant, and pronounced by the Court to have been proved against him, and a monition issued admonishing him not to repeat them, the Court can, without further articles, and on proof that the identical offences have been repeated and the monition disregarded, pronounce against the defendant a decree of suspension ab officio et a beneficio? It is, I believe, contended that it cannot; first, because a decree of suspension cannot be pronounced as a punishment for contempt, for which the only remedy is that of imprisonment under the statute of 53 Geo. 3, c. 127; and next because, if such a decree could be pronounced at all it

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could only be "ab officio," and not "a beneficio;" and, lastly, that it cannot be done on motion and without fresh articles.

As far as this Court is concerned, it is a complete answer to all these objections to point out that, in the case of Mr. Purchas, the Judicial Committee of the Privy Council, which is the Court of Appeal from this Court of Arches, did suspend Mr. Purchas "ab officio et a beneficio" upon motion and without further articles, upon the sole ground of his having treated a decree of the Court with contempt and contumacy. (1) That case is therefore an authority directly in point for what this Court did in Mr. Mackonochie's case. And had I doubted the soundness of that decision I should still have felt bound not to discredit the decision of the superior tribunal by refusing to act upon it. But that decision appears to me to be in entire conformity with the ancient law and practice of the Ecclesiastical Courts. The ancient and proper methods of enforcing obedience to the ecclesiastical law and to the decrees of the Ecclesiastical Courts is by the infliction of ecclesiastical censures. "Ecclesiasticæ jurisdictionis exercendæ nervi sunt pœnæ et censuræ ecclesiasticæ:" Oughton's Ordo Judiciorum, tit. 137, in notis. These censures were of different kinds. They will be found enumerated in the above note to tit. 137 in Oughton. After stating the censure which is in use against laymen as well as the clergy, which is excommunication, the author speaks of other censures which are applicable only to the clergy; first, sequestration; and then "suspensio dicitur quæ (post monitionem debitè factam) ecclesiasticam personam ab officio, seu beneficio, vel ab utroque, ad tempus, excludit." Then follows, "deprivation," "cum, ob delicta majora quis ab ecclesiastico beneficio penitùs amovetur;" and, finally, "degradation."

Suspension, therefore, following upon monition is here enumerated among the weapons with which the Ecclesiastical Courts have been armed to enforce obedience to the law, and not merely obedience to a decree of the Court; and suspension, it will be observed, is here spoken of as being not only ab officio, but also a beneficio.

In another passage of the same book, at tit. 38, in a note to the words "Accusatâ contumaciâ," I find the following: "Pœna

(1) *Hebbert* v. *Purchas*, Law Rep. 4 P. C. 301.

contumaciæ est excommunicatio vel suspensio." "De his vide plura" . . . . tit. 137. So that the author declares suspension to be one of the punishments for contumacy, and for the nature of this suspension he refers to the description in tit. 137, which includes suspension "a beneficio." And I may here say, that with the exception of the passage I am about to cite from Godolphin's Repertorium Canonicum, I have not found in any of the old books a distinction drawn between suspension ab officio and suspension a beneficio as being by law appropriated to different classes of offences. It appears rather that they were pronounced indiscriminately, according to the discretion of the judge, regard being had, of course, to the nature of the case. The passage in Godolphin is to be found in the appendix to his book at paragraph No. 43, and is as follows:—"To defend the ecclesiastical power, and to controll obstinate sinners and contumacious offenders, the censures of the Church were introduced, which are inflicted according as the offence is greater or lesser; . . . . these are reckoned by Lindwood to be of three sorts—'suspensio,' 'excommunicatio,' and 'interdictum.'" . . . . "Suspension is the proper punishment of an offending clergyman—'suspensio est censura quædam ecclesiastica,' . . . . it is either ab officio vel beneficio; the first is the punishment for contumacy in not appearing upon lawful summons, the second for higher crimes." "This censure is inflicted . . . . by the decree of the judge or the law; and then for a greater or a smaller crime; if for a smaller fault, then it is only ab officio. . . . . Or if a clerk that is suspended ab officio, shall continue so without submission or seeking to be restored, then he may be suspended a beneficio also, 'subtrahi debet beneficium,'" &c. "By the canons of King James, if his contumacy continues he is to be excommunicated, and after forty days he is deprivable for incorrigibility." Again, at paragraph 46, Godolphin says: "For several offences the law doth suspend a clergyman as after due notice for refusing to christen or bury." . . . . "They also that omit to read the common prayers, as by law prescribed, incur the pain of suspension." At paragraph 49 the author goes on thus: "The next censure of the Church is excommunication, which is inflicted either ab homine vel jure; when it is inflicted ab homine it is usually for contumacy in not appearing before the

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ecclesiastical judge after a legal summons, or else for disobeying the orders, decrees, or sentences of the Court and the slighting of his authority." (1)

These passages shew how separate and distinct suspension and excommunication are as ecclesiastical censures; and here it is well to bear in mind that the Act of George III., which gave the power of imprisonment, gave it only as a substitute for excommunication, and left untouched the other ecclesiastical censure of "suspension." These passages also shew that while the lighter form of suspension, which is "ab officio" only, is a proper punishment for contumacy in not appearing on summons, the graver form, which is "a beneficio" also, is a proper punishment either for contumacy in disobeying the orders of the Court, or for offences against ecclesiastical law, among which is enumerated "omitting to read the common prayers as by law prescribed." In the collection of cases before the Delegates, (2) which were extracted from the original records by Mr. Rothery, several cases will be found which illustrate the practice of the Ecclesiastical Courts in respect of suspension, and they are in conformity with the passages just cited from Godolphin. Case No. 79, *Clewer* v. *Pullen*, is one. In that case a suit was promoted by Pullen against Clewer for neglecting his ministerial duties in preaching and reading prayers, baptizing infants, &c. The Court of Arches suspended Clewer pendente lite, and sequestered the profits of his benefice to be applied in providing a curate. Ultimately the Court deprived him. This was affirmed by the Court of Delegates. Case 58, *Hart* v. *Carey*, is another instance of suspension. The promoter brought into the Court of Arches a sentence of the Consistory Court of Peterborough by which Hart had been suspended for not conforming to the rites of the Church of England, and for omitting many parts of the services prescribed by the Book of Common Prayer. The Court of Arches pronounced that the charges had been proved, and that Hart ought to be corrected and punished. Case 118, *Jones* v. *Pusey* and another, church-

(1) Godolphin, Repertorium Canonicum (2nd ed.), London, 1680, Appendix, pp. 15, 16.

(2) Return of all Appeals in Causes of Doctrine or Discipline made to the High Court of Delegates. . . . . Parliamentary Papers 199, April 3, 1868.

wardens. That was a suit in the Consistory Court of Sarum. The bishop, on the 20th of April, 1703, gave sentence that Jones had repeatedly spoken words in contempt of the Prayer Book, and for that and other causes suspended him from his office for six months and until he shall satisfy the bishop. The Court of Arches affirmed this sentence. The Delegates, on appeal, affirmed the sentence, except as to satisfying the bishop. Case No. 134, *Boughton* v. *Dean and Chapter of York*. Boughton having absented himself from his duties as vicar-choral, the dean and chapter had appointed a substitute and sequestered the emoluments of the office for the substitute's use. Boughton told the receiver not to pay the emoluments to the substitute. For this the dean and chapter called upon him to make an apology, and on his refusal suspended him from office, and continued the sequestration of the emoluments until he should comply. This sentence was confirmed by the Delegates. Case No. 99, *Hancock* v. *Bomer*. The suit was promoted to compel Hancock to provide for performances of services to his church. Hancock did not appear when cited in the Consistory Court of Exeter; was pronounced contumacious, and decreed to be suspended during the bishop's pleasure, the tithes being sequestered to provide for a curate. The Court of Arches held that Hancock must provide a curate. There was an appeal to the Delegates; nothing appears to have been done on the appeal.

These and other cases to be found in the same collection shew that suspension was commonly resorted to as a punishment for ecclesiastical offences, as well as for disobedience to the orders of the Ecclesiastical Courts. In some of the cases it is stated that the suspension was "from his office," in others the nature of the suspension is not directly stated, but it is stated that the profits of the living were sequestered. I will only add one more instance of suspension. It is mentioned in Burn's Ecclesiastical Law, vol. ii. p. 141 d: "Contumacy in wearing an irregular habit. After monition, was punished with suspension ab officio et beneficio by Archbishop Stratford, which could only be redeemed by payment of a fifth part of the profits of the benefice for one year to the poor." The case is cited from Lindwood's Provinciale, lib. 3, tit. i. p. 122, and is, of course, of very ancient date. Archbishop Stratford, however, is stated in Archdeacon Hale's introductory

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essay to his book of Precedents to have been for some time Dean of Arches before he obtained the archbishopric, and very learned in the practice of the canon law. If the case is to be relied upon it is a direct authority to justify suspension for contumacy ab officio et a beneficio, even where the order disobeyed concerned minor and inconsiderable matters. It is, I believe objected, that suspension a beneficio as well as officio, is a sort of temporary deprivation, and operates not only upon the ecclesiastical position of the clergyman but on his temporal rights in the fruits of his living. And it cannot be denied that this is so—but that suspension of this character is, notwithstanding, within the powers of the Ecclesiastical Courts is equally free from doubt. In matters of ritual, the corrective powers of the Ecclesiastical Courts, and with them, the use of this particular censure of suspension, have for long slumbered until the unhappy controversies of the present day arose. But in cases of immorality and drunkenness, the power of suspension ab officio et a beneficio, has been in constant use, as the ecclesiastical reports during the last century and up to the present time, amply testify. Nor can it be doubted, I think, that departures from the authorized ritual of the Church, such as those which form the subject of this suit and the suit against Mr. Mackonochie, are in their nature ecclesiastical offences to which the punishment of suspension is applicable. For it is I consider well established, that for offences of this character this Court has the power of deprivation, which must include the lesser power of suspension. To quote from Godolphin's work again, the following passage will be found, at page 306: "Causes of Deprivation—Incorrigibleness and obstinate disobedience to the canons of the Church—as also to the ordinary—for refusal to use the Book of Common Prayer or administer the Sacraments in the order there prescribed—the use of other rites or ceremonies, order, form, or celebrating the same, or of other open and public prayers." But all doubt upon this subject of deprivation must, I think, be set at rest by the decision of the judges in *Caudry's Case*, reported in part 5 of Coke's Reports, p. 1. It was an action of trespass by a parson, and the defendant's justification rested upon the validity of a sentence of deprivation which had been passed upon the plaintiff by the Court of Delegates. The jury returned a special

verdict setting out all the facts, from which it appeared that the plaintiff had been deprived by the Bishop of London and others (constituting the Court of Delegates) for "preaching against the Prayer Book and refusing to celebrate divine service according to the said book." The case was "solemnly and oftentimes debated at the bar and at bench by the judges, and after long deliberation and consultation with the rest of the judges adjudged." It had been argued that the offence if any was against the Act of Uniformity of Queen Elizabeth, and that under that statute it is expressly provided that deprivation should only be for a second offence. But the Court held that by another clause in the statute it was enacted by way of proviso that the original jurisdiction of the Ecclesiastical Courts should be preserved, and that being so the Court said that, the book being enjoined by statute, "the ecclesiastical judge may deprive such parson, vicar, &c., as shall not observe the said book as well for the first offence as he might have done by the censures of the Church and the ecclesiastical laws if no form of punishment had been given by the Act." It is hardly necessary to add that the clauses in the Act of Elizabeth for enforcing the use of the Prayer Book are by the Act of Uniformity of Charles II., kept alive and made applicable to the present Prayer Book.

Assuming, then, that these offences in matters of ritual are properly punishable by the Ecclesiastical Courts and liable to be visited with the extreme penalty of "deprivation," it can hardly be seriously contended that this Court is acting beyond its powers in visiting them with the lesser sentence of "suspension." It was in this way that the Court of Queen's Bench reasoned in the case of *Ex parte Rose* (1), where it upheld the power of the bishop to suspend "ab officio et beneficio" for an indefinite time as a punishment for immorality, on the gound that he clearly had the power to "deprive."

I may here remark, with regard to the distinction between suspension "ab officio" and suspension "a beneficio" in addition, that when the justice of the case demands a suspension for a considerable time, such as was the case with Mr. Mackonochie, it is only right, in reference to the needs of the parish, that the

(1) 18 Q. B. 751.

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decree should extend to the fruits of the benefice as well as the office of the minister. For it is the duty of the bishop to provide for the performance of the various services of the parish, and the fruits of the living are the proper funds out of which a curate should be remunerated. If it be said that this could be done by the bishop issuing a sequestration, the answer is that a decree of suspension "a beneficio" binds the fruits of the benefice from the time when it operates, and secures to the parishioners the benefit of those funds for the needs of the parish in preference to any sequestration for debts or otherwise. See *Morris* v. *Ogden* (1) and *Bunter* v. *Cresswell.* (2)

Upon the whole, then, I think there is good ground for saying that the power of punishing by suspension ab officio et a beneficio is one that has resided in the Ecclesiastical Courts time out of mind; that it is a censure applicable in its nature to offences against the Act of Uniformity, in celebrating the divine services in a manner contrary to that prescribed by the Prayer Book; and, lastly, that it is, according to the practice of the Ecclesiastical Courts, an established form of censure for contumacy and disobedience in a clergyman. What this Court did, therefore, in the case of Mr. Mackonochie, and what it did also in this case, is this: to suspend the defendant ab officio et a beneficio, not merely because he had been guilty of contumacy in disobeying the orders of the Court, but because he had also been guilty of a grave ecclesiastical offence by repeated breaches of the law of the Established Church in respect of ritual. It is true that for the first of these offences it was competent to the Court to resort to excommunication, or rather the modern substitute for it provided by the statute of George III., and subject the defendant to imprisonment; but no such punishment is available by law for the ecclesiastical offences charged originally in the articles in both these suits and proved to have been repeated since. And it cannot, as it seems to me, be incumbent on this Court, because the defendant has also been guilty of a contempt, to pass by the fact that the defendant has repeated the offences with which he was originally charged, and punish him for the contempt only.

I now turn to a totally different question, which is this:—

(1) Law Rep. 4 C. P. 687, at p. 703. (2) 14 Q. B. 825.

whether, assuming that the Court has the power of suspension in respect of offences such as are charged in the articles in this suit, it can exercise that power upon proof of those offences having been repeated, without any fresh charge made by articles in a fresh suit. For this is the real question involved in the objection which I believe has been made, that the Court cannot exercise its powers of suspension in what has been called a summary way upon motion. It will be convenient to consider what the steps are which by the practice of the Court are taken in this method of proceeding. The promoter of the suit files a written notice, headed in the cause, in which he refers to the monition which recites the charges made in the articles; the notice then goes on to state definitely (giving particulars of time and place) which of the practices, from which the defendant had been admonished to abstain, he proposes to prove to the Court that the defendant has repeated. This notice together with copies of the affidavits upon which the application is founded, is served personally upon the defendant, who is thereby made acquainted with the exact nature of the charge against him and the day when the Court proposes to hear it. It is of course open to him to appear and contest the facts if he can, and in case of any difficulty arising the Court has ample power of doing justice by adjournment or otherwise. Now adverting to the fact that the charges thus made on motion are only charges of repeating identically the same offences which have been previously charged, in the most formal manner, in written articles to which the defendant has had an opportunity of pleading, and which, at the hearing of the cause, he has had full opportunity of discussing both in fact, and (what is much more important) in law also, it is difficult to perceive what more formal proceeding the justice of the matter requires than that which I have just described. The law having been fully discussed and determined at the hearing of the cause, and the defendant warned and ordered not to repeat the offence, the only question that subsequently arises is the short one of fact, whether he has done so or not—subject of course to any explanations he may have to offer; and to hold that this ought to be the subject of a fresh suit and fresh articles with its attendant expense and delay would, at least as far as the defendant is concerned upon whom the cost if

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guilty would fall, be of little benefit and probably of great hardship. But again, if something more formal than a motion made in the way I have described is requisite in the case of suspension, why should it not also be requisite in the case of applying for a significavit under the statute of George III? If suspension a beneficio touches the temporal rights of property, the significavit, which involves imprisonment, touches the still higher temporal right of the liberty of the subject. Suspension from the benefice must surely be a much less onerous punishment than continued imprisonment of the person, and it would be hard indeed upon the clergy if the Court were bound to resort to the latter and have no power to adopt the former in cases such as this:—yet this would be the result if the powers of the Court upon motion were confined to those which it exercises under the statute of George III.

Nor has the Church Discipline Act, as it seems to me, any bearing on this question. All that the Act provides is, that no suit shall in future be brought, except in the way prescribed; whereas the question here is not what new suit may be brought, but what may be done in an existing suit brought under the provisions of the Act itself.

In pursuing this subject it is worth while considering what, according to similar reasoning, might happen in cases of another character in which the Court is in the constant habit of pronouncing sentence of suspension both ab officio et a beneficio, such, for instance, as cases of drunkenness. It might well be, in a case of that kind, that perhaps one only of several charges of drunkenness alleged in the articles should have been proved, and the charge so proved subject to some extenuation. In such a case the Court might think it reasonable and right to admonish the defendant for the future, without passing any sentence of punishment upon him. Now, under such circumstances, if the defendant should disregard the monition and repeat the offence, can it be contended that there must either be a fresh suit against him with fresh articles or that the Court must treat the case as one of contempt, and send the defendant to prison for disobeying the monition?

Considerations of the foregoing character, coupled with the general bearings of these cases in respect of justice, expense, and delay, lead me to the conclusion that when, after dealing with the

past, the suit is kept alive as is the practice in this Court by a monition as to the future, it must be competent to the Court to deal with offences which have been repeated in the same manner that it could have dealt with the original offences without any second suit or fresh articles, subject, of course, to all questions of delay and the lapse of reasonable time. It is, I am aware, said in one of the old books, I think Gibson's Codex, that deprivation cannot be pronounced except upon regular articles first exhibited. But in old times there were a vast number of proceedings in Ecclesiastical Courts which did not assume the form or character of written articles; and this passage was probably intended to exclude proceedings of that kind in a case of deprivation. Archdeacon Hale's Book of Precedents, extracted from the Consistory Court of London and the Court of the Archdeacon in Essex (1), is full of such cases—but it by no means follows, as it seems to me, because no man ought to be deprived except for an offence which has been distinctly charged against him in written articles, that he cannot be so deprived when the offence has been so charged and described, and he has been proved to have repeated it.

I regret that this question, which is, after all, rather one of practice than of anything else, cannot be set at rest by any reference to the records of the court. Monitions of the Court have, I believe, until late times been generally obeyed by the clergy, which may perhaps account for the dearth of precedents; but I do find one case which throws some light upon the subject. It will be found among the cases collected by Mr. Rothery (2), No. 135, *Harrison* v. *Archbishop of Dublin.* The archbishop had admonished Harrison to extract a licence to serve the cure of souls in the parish of St. John. Harrison claimed to be incumbent of that parish, and disobeyed the monition. The archbishop pronounced him contumacious, and sentenced him to be suspended. Harrison appealed to the Delegates, and complained that no articles had been exhibited against him, and no proofs brought in in the regular way. The Delegates pronounced against the

(1) A series of Precedents and Proceedings in Criminal Cases, &c, by William Hale, Archdeacon of London. London, 1847.

(2) Return of all Appeals in Cases of Doctrine or Discipline before the Delegates, &c.

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appeal. The next case, No. 136, *Higgins* v. *Archbishop of Dublin.* is said to be similar. Higgins was suspended for contumacy of the same character, and the sentence affirmed by the Delegates. But there is yet another consideration which goes far to shew that the course pursued by the Court, both in the case of Mr. Mackonochie and in this case, is not only justified in these cases, but is, in truth, according to the old ecclesiastical practice, the only course open to it in any case where it thinks it right to pronounce the ecclesiastical censure of suspension "ab officio et beneficio" as a punishment for ecclesiastical offence. For it is stated in the passage from Oughton's Ordo, above quoted (and the same thing will be found elsewhere), that suspension should be "post monitionem debite factam." This monition not to offend in future, cannot be issued by the Court until the charges in the articles have been heard, and declared to have been proved. It can only issue therefore after the hearing and determination of the cause, and is in practice so issued. How then, it may be asked, can the Court afterwards proceed to punish the defendant by suspension in any other way than on motion? unless indeed it be suggested that in all such cases two suits are requisite—one to end in a monition, and a second reciting the monition in the former suit alleging repetition of the offence, and praying for suspension as the punishment. No doubt this ancient practice of decreeing suspension only after monition has not been strictly followed in modern times, as may be seen in cases of suspension for immorality or drunkenness, and as indeed has happened in the suit against Mr. Mackonochie, where Sir Robert Phillimore appears to have pronounced sentence of suspension on the hearing of the cause, and without previous monition. (1) But the fact, that in ancient times it was the practice not to proceed to suspension without previous admonition remains, and is, for the reasons I have just stated, cogent, I think, to shew that in those times at least it must have been competent to the Court to pronounce the sentence of suspension without further articles. For these reasons I am satisfied that the decree of suspension made in this case is a valid one; but on the ground I have above stated I shall defer judgment on the present motion.

(1) Law Rep. 4 A. & E. 279

The Queen's Bench Division, on the 8th of August, made absolute the rule in *Martin* v. *Mackonochie* referred to in the preceding judgment. (1)

Nov. 2, 1878. The case was called on, and the following judgment was delivered.

LORD PENZANCE. The Court reserved its judgment in this case, until the rule for a prohibition in the case of Mr. Mackonochie had been decided—for although the cases are not identical, a prohibition granted in the one would hardly leave room for this Court to take compulsory measures in the other. That decision has now taken place (1), and I venture to think that the result has caused a very general surprise. It has been a surprise I imagine to the learned members of the Judicial Committee of the Privy Council to learn that the Court of Her Majesty in Council is an "inferior Court," and as such subjected to the control and supervision of the Common Law Courts, and still more so to find that this supervision, by a sweeping use of the word "jurisdiction," extends to the regulation of their own procedure and practice. Nor will the reason given for this asserted authority be perhaps wholly satisfactory. That the Common Law Courts have been used to issue writs of prohibition to the Court of Delegates, when they handled matters not within their jurisdiction, is undoubted. And that the Sovereign in Council now exercises, amongst many other functions, the functions which the Delegates used to discharge in ecclesiastical suits is also beyond dispute. But does it follow from these premises that when this ecclesiastical jurisdiction was transferred by Act of Parliament to a tribunal of the highest dignity, in which the Sovereign herself (personally authorizing the judgment) takes a part, this tribunal became at once an "inferior Court," and subject as such to the writ of prohibition—simply because some of the duties which it discharges are those which an inferior Court had previously been used to discharge? In a word, is it the character and position of the Court itself, or is it the character of the jurisdiction which it exercises, which makes it liable to be controlled by prohibition? It occurs to one to ask, what before the Judicature Act was the position of the Courts of Probate and Matrimonial Causes? The entire jurisdiction of these Courts was one which

(1) 3 Q. B. D. 730.

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had previously belonged to the Ecclesiastical Courts, and in respect of which prohibitions had been very freely and constantly granted. Did the right and power to grant such prohibitions continue after this jurisdiction had been handed over by the legislature to new Courts, created Courts of Record, and intended to take rank and position on a level with that of the superior Courts at Westminster? These are matters which will deserve and require to be considered before the somewhat hasty assertion, without authority, and without argument at the bar, of a right which has I believe never yet been exercised, and which could not as it seems to me be exercised, in the case of a definitive sentence passed by the Queen in Council without directing the writ of prohibition personally to the Sovereign herself, is likely to command a very general acceptance or respect. The judgment in question must also be a surprise to Sir Robert Phillimore, my very learned and highly respected predecessor. After the very unusual compliment paid to him, a living author, of quoting his valuable book on Ecclesiastical Law as a legal authority, he must be surprised to find that it is laid to his charge that he has deviated from the practice of his own Court, and has acted "ultrà vires" in issuing a monition to Mr. Mackonochie, ordering him to abstain in the future, in addition to a sentence punishing him for offending in the past—the only reason given why this proceeding was "ultrà vires" being, that it was contrary to the practice of the Court over which he with so much distinction presided. Nor is he able to take refuge in the excuse offered for him, that in so acting he was only following what the Judicial Committee of the Privy Council had done in two previous cases—inasmuch as that tribunal has never done anything of the sort—and the suggestion that it has done so, is at once refuted upon carefully reading the report of the two cases in question. But to no one I imagine would this decision be more surprising than to the learned counsel who represent Mr. Mackonochie. The ground on which they asked for a prohibition was this—that Mr. Mackonochie's disobedience to the monitions which had been served upon him could only be punished in one way—namely, by imprisonment for contumacy, and consequently that to punish him by suspension was contrary to ecclesiastical law and practice. But it never occurred to them to assert, that the issuing of the monition

itself was a departure from the established procedure of the courts in which they had been accustomed to practice, or to put forth the doctrine, which I will venture to call startling, that a monition or order to refrain in future from definite illegal practices in the conduct of divine service, even when lawfully issued by an Ecclesiastical Court, is nothing more than a piece of waste paper which the defendant is at liberty to treat with contempt, and the Court is powerless to enforce. How this can be asserted in the face of the statute of 53 Geo. 3, c. 127, which invests the Ecclesiastical Courts with the power of pronouncing in contempt "any person neglecting or refusing to pay obedience to the lawful orders or decrees as well final as interlocutory of such Court," and by means of a significavit imprisoning such persons, I am at a loss to discover. But that these two propositions, if in any degree warranted by the practice of the Ecclesiastical Courts, or even arguable in connection with that practice, should have escaped the vigilance or exceeded the hardihood of the very acute, and learned, and I may add sufficiently bold ecclesiastical lawyers who had Mr. Mackonochie's interests in charge, I am still more at a loss to imagine. And lastly, the public must, I think, have been surprised to discover that a system of judicature should exist in this country, so anomalous, and so repugnant to common sense, as that which this judgment affirms, and which I will in a few words proceed to explain.

In this country there have been, time out of mind, different groups of Courts exercising different jurisdictions, and administering different laws, the Courts of Common Law, the Courts of Equity, the Court of Admiralty, the Courts Ecclesiastical, part of whose jurisdiction has been in modern times transferred to the Courts of Probate and Divorce and Matrimonial Causes, and many other inferior Courts. All these Courts (I am speaking of matters as they stood before the Judicature Act) dealt with different subjects and administered different laws. They proceeded by different methods, and had a special practice all their own, which they amended from time to time and regulated for themselves. A proper Court of Appeal from each Court or set of Courts reviewed their decisions in point of law, and controlled their procedure. So matters stood before the Judicature

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Act, which did not affect the Ecclesiastical Courts, nor confer any powers on the High Court of Justice for interference with them. In this state of things the novel claim now made by the Queen's Bench Division is this: that the judges of that Court who are wholly unskilled and uninformed (officially speaking) in the practice of the Ecclesiastical Courts, who have not even the means of knowing what that practice has been by access to the records of those courts, are empowered by law to sit in judgment upon the question whether a particular proceeding is in accordance with usual practice or not; and, deciding in the negative, to suddenly put a stop to the suit altogether, leaving justice wholly unadministered, and both parties to pay the costs of a fruitless litigation. If this result had been the fault of the parties in addressing themselves to the wrong jurisdiction, it might be said that they had themselves to blame. But if the thing complained of is no more than a wrong step in a rightful suit, one would have thought it impossible but that the Court which reviewed that step, and pronounced it wrong, should have power to put matters right and let the suit proceed. And this is the power which resides in a Court of Appeal. But the Queen's Bench Division is not a Court of Appeal from the Ecclesiastical Courts, and has no such powers, and that they should thus summarily intervene, and pronouncing a judgment upon what is, or is not, the practice of this Court (which I will presently shew is absolutely mistaken in point of fact) should thus put a summary end to the suit, to the great loss and prejudice of the suitors, is, I repeat, an anomaly in judicature for which the public was, I think, hardly prepared. But what must have been thus a surprise to others, becomes little less than consternation to those who have to administer the ecclesiastical laws of the realm in future. They can only regulate their proceedings by previous decisions in their own Courts, subject to the review of their Courts of Appeal. And if when following the decisions of those Courts of Appeal, as in the present case, they are liable at any moment to have their proceedings stultified and brought to a sudden stop by an extraneous tribunal which has no official experience in these proceedings, or knowledge of their requirements, they are placed in the difficulty of either ignoring the decisions of the Appeal Courts,

or inviting a writ of prohibition. In this dilemma their authority cannot fail to be impaired, if not destroyed, and I do not hesitate to affirm that the efficiency of this Court will be wholly arrested in future, if the principle acted upon in Mr. Mackonochie's case be applied to its future proceedings. It is for this reason that I have felt it my duty to examine freely this decision, together with the reasoning upon which it is based, and having done so, to publicly make my protest against this new interpretation of the word "jurisdiction," and the paralysing influence over this Court which has been usurped by the Queen's Bench Division under colour of it.

I propose to shew that the judgment of the Lord Chief Justice is based upon serious misconceptions of fact, and equally grave misinterpretations of the law, but before doing so I will state exactly what it is which that judgment has decided.

Sir Robert Phillimore, when presiding in this Court, punished Mr. Mackonochie for certain illegal practices by a six weeks' suspension, and in addition admonished him to abstain in future from these practices. Mr. Mackonochie repeated them, notwithstanding the monition which had forbidden him to do so, and for this conduct, which was both a repetition of the original offence and a contempt of the monition, I suspended him from his office and benefice for a period of three years. The judgment of the Lord Chief Justice pronounces the whole of these proceedings, subsequent to the first punishment of six weeks' suspension, to be either "ultra vires" or "coram non judice" (I think these are his expressions), because they are, he says, contrary to the practice of the Ecclesiastical Courts. For treating the matter as if it was a case in the Common Law Courts, or the Criminal Courts of the country, he conceives that the Ecclesiastical Courts have never done, and have no power to do, more than punish the particular offences which were charged in the suit; and that having done so, the suit is at an end, any fresh departures from the law being punishable only in a fresh suit. In this view of the case, it would be difficult to account for the existence in ecclesiastical law of such a thing as a monition, which is a process or order wholly unknown to the common or criminal law of the land. But this difficulty is got over by the assertion that a monition in a criminal suit is nothing

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more than a mild punishment, a species of rebuke, or condemnatory shake of the head, which the defendant is at liberty to disregard if he pleases, and for disobedience to which no punishment of any kind can be inflicted by the Court.

Such is the view taken by the Lord Chief Justice of the practice and procedure of this, and the other Ecclesiastical Courts of the kingdom, up to the time when, as he asserts, the Judicial Committee in a previous suit against Mr. Mackonochie, and in a suit against Mr. Purchas, "usurped the jurisdiction now exercised." The Ecclesiastical Courts can punish (the Lord Chief Justice contends), like the Criminal Courts, any offence within their jurisdiction, but, like the Criminal Courts, they can only do so by means of a suit commenced after the offence was committed. So that if a clergyman systematically sets the law at defiance, and insists, Sunday after Sunday, upon performing divine service in an illegal manner, the practice and procedure of the Ecclesiastical Courts does not, says the Lord Chief Justice, permit them to do more than award a punishment for the past, and does not empower them in addition to make any order upon the defendant to desist from the same illegal practices in future. It is upon this reasoning that the Lord Chief Justice declares that the monition issued by Sir Robert Phillimore in this case of Mr. Mackonochie's was a departure from the proper practice of the Court; because that learned judge, dealing first with the past, sentenced the defendant to a suspension of six weeks; and then, dealing with the future, issued a monition to him to desist from the practices which had been condemned.

The second point upon which the Lord Chief Justice has declared these proceedings to be illegal and void is that to which I have above alluded; while admitting that there is such a thing in ecclesiastical practice as the issuing of a monition to abstain from illegal practices, he declares that such a monition can only be issued as the substantive punishment awarded by the Court for the past offences which the defendant may have committed. So that if the defendant is charged with any departure from the rubrics of the Prayer Book, and the Court finds the offence to be proved, in fact and in law, it is then at liberty to pass a sentence of punishment; and among the punishments which the Court may

inflict is this "admonishing," or issuing of a "monition" to the defendant ordering him not to do so again; which monition, when issued, puts an end to the suit, leaving the defendant to obey it or not, as he pleases, and the Court in the not very dignified position of having issued an order for which it cannot enforce respect.

I believe I have thus correctly expressed the Lord Chief Justice's meaning, but I will quote his own words:—"The result, then, at which I arrive on the most careful consideration I can give the subject is, that a monition in a penal suit while, if pronounced as a definitive sentence, it carries with it no ulterior consequences, cannot be appended to a definitive sentence awarding a specific punishment, so as to prolong and enlarge the jurisdiction of the Court and to warrant any further proceedings on a repetition of the offence as for contumacy."

I shall presently shew that the Lord Chief Justice is wholly mistaken in point of fact, and that for want of acquaintance with what has been usual in the Ecclesiastical Courts, he has been led to denounce, as a modern usurpation by the Judicial Committee of the Privy Council, a practice which has the authority of the most learned judges who have ever presided in the Ecclesiastical Courts, including the distinguished names of Dr. Lushington, Sir John Nicholl, and Lord Stowell.

But, before doing so, I must deal with what is a far more vital question. Let it be assumed for the moment that this Court did in Mr. Mackonochie's case deviate from its ancient practice, does that constitute an excess of jurisdiction? and does the law permit a Court of Common Law to sit in judgment upon such a question; first determining what is, and what is not, the ancient and proper practice of the Ecclesiastical Courts, and then, because it considers a particular method of proceeding to be at variance with that practice, declaring that the Court has exceeded its jurisdiction, and must be stopped by a writ of prohibition? Now I venture to affirm that no such power has ever been claimed or exercised before. In all the old Text books—books of the highest authority—the Abridgments of Viner and Bacon, and the Digest of Comyns, the subject of Prohibition is treated at large. In Comyns' Digest alone there are no less than forty pages devoted to it, and from first to last in these books there is not a trace of the courts

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of law ever having interfered by way of prohibition, unless either the subject of the suit was not within the jurisdiction of the inferior Court, or that Court in the course of dealing with a matter which was within its jurisdiction had incidentally dealt with some other matter, the determination of which properly belonged to some other jurisdiction. To these definitions may be added general statements that the Courts of Common Law would interfere if the inferior Courts did anything contrary to the law of the land. No authority has been cited by the Lord Chief Justice for any extension of the writ of prohibition beyond these limits. On the other hand it is not easy to prove a negative, and cite authorities to disprove a right or power which has never before been asserted. The natural course in such a case is to consult such definitions as may be found in the older authorities, of the writ of prohibition, its objects, and its application. At the head of the title "Prohibition" in Bacon's Abridgment is the following:—"And for this purpose the writ of prohibition was framed, which issues out of the superior Courts at common law to restrain inferior Courts, whether such Courts be temporal, ecclesiastical, maritime, or military, &c., upon a suggestion that the cognizance of the matter belongs not to such Courts. . . ." "So that prohibitions do not import that the ecclesiastical or other inferior temporal Courts, are alia than the King's Courts, but signify that the cause is drawn 'ad aliud examen' than it ought to be; and therefore it is always said in all prohibitions (be the Court ecclesiastical or temporal to which they are awarded) that the cause is drawn 'ad aliud examen contra coronam et dignitatem regiam.'" In Viner's Abridgment tit. "Court," letter D, it is said, "The Court ought to take notice of and give credit and faith to the proceedings and sentences in the spiritual Court, and to think that their proceedings are consonant to the law of Holy Church, for 'cuilibet in arte suâ perito est credendum,' though what they do there be against the reason of our law," and for this is cited 7 Coke's Reports, 43 b. The definition given of a prohibition in Viner's Abridgment is cited from Wood's Institute (1), another book of high authority, as follows:—A prohibition issues "to forbid a

(1) An Institute of the Laws of England . . . . Thomas Wood, LL.D., London, 1772, p. 566.

judge to proceed, in a cause that belongs to the Common Law Courts, or that belongs not to his jurisdiction, though the courts of law can give no remedy." Again, in Viner's Abridgment, tit. Prohibition (Q), is the following: "The probate of wills is a matter purely spiritual, and so they may proceed in their own manner, though different from ours," and again, "Agreed (Show. 172), in case of *Shotter* v. *Friend*, if the spiritual Court proceeds in a matter merely spiritual, and pertaining to their Court, according to the civil law, though their proceedings are against the rules of the common law, yet a prohibition does not lie."

In Comyns' Digest "Prohibition" (F 1) under the heading "for what cause granted," is the following: "A prohibition shall be granted to the spiritual Court in all cases where the ecclesiastical judge proceeds in a matter out of their jurisdiction: though the temporal Court has not cognizance of the matter for which the libel is in the spiritual Court; for it is a sufficient cause for a prohibition that the Ecclesiastical Court exceeds its jurisdiction."

In none of these descriptive passages, it is to be observed, is anything said of a prohibition to an inferior Court because it dealt in this way or that with a matter over which its jurisdiction could not be questioned. But I will proceed to other authorities. In *Breedon* v. *Gill* (1) Chief Justice Holt expressed himself as follows:—"When the Ecclesiastical Courts are possessed of a cause which is merely of spiritual cognizance, the Courts at Common Law allow them to pursue their own methods in the determination of it; but when in such a cause collateral matter arises which is not of their conusance properly, there the Courts of Common Law enforce them to admit such evidence as the common law would allow." In the thirteenth part of Lord Coke's Reports, folio 44, there is a long case "De modo decimandi," the main question being whether a custom should be tried in the Ecclesiastical Court, or a prohibition should issue. But to the fourth objection made that the Ecclesiastical Court had refused a plea "de modo decimandi," the judges resolved that "If the spiritual Court ought to have the trial de modo decimandi, then the refusal of acceptance of such a plea should give cause of appeal, and not of prohibition—as if an excommunication, divorce, heresy, simony, &c., be pleaded

(1) Ld. Raym. 219, 221.

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there, and the plea refused, that gives no ground of prohibition; as if they deny any plea, a mere spiritual appeal, and no prohibition lieth." The expressions used in these authorities make sufficiently clear the line which has always hitherto been drawn between entertaining a suit or incidental matter which lies out of the jurisdiction of the Court, and proceeding in a faulty or improper way in a matter which lies wholly within it. The first is ground of prohibition, and the last is ground of appeal. This line of distinction has unfortunately been overlooked by the Lord Chief Justice, which is the more surprising, as it has been firmly upheld by one of the most able and distinguished members of his own court. Mr. Justice Lush, in giving judgment in this very case of Mr. Mackonochie, expressed this distinction in language admirably clear and unambiguous, as follows:—

"It is admitted that the Ecclesiastical Court had jurisdiction over the subject-matter, and jurisdiction to pronounce for the offence of which it has found the defendant guilty—the very sentence which it has pronounced. I think we have no jurisdiction to inquire whether the ordinary course of procedure has, or has not, been followed in this case. The practice and procedure of every Court when no Act of Parliament intervenes to regulate it (which I assume to be the case here), is within the exclusive cognizance of the Court itself. If, in a particular case, the mode of proceeding were shewn to be ever so irregular and at variance with the ordinary practice, it would not give this Court jurisdiction to interfere. Irregularity in procedure is matter of appeal and not of prohibition, and the appeal is to the Privy Council and not to this Court."

But I will now advert to a decision the great weight of which will not be denied in Westminster Hall. In the year 1835 a Mr. Smyth was engaged in a suit with his wife, which after passing through the Ecclesiastical Courts, came to the King in Council by way of appeal. The Judicial Committee retained the cause, and ordered Mr. Smyth to appear absolutely. Conceiving himself aggrieved by this order, and maintaining that, on a former appeal to the Court of Delegates, the matter had been otherwise decided, Mr. Smyth applied to the Court of Queen's Bench for a probibition. The case was heard by Mr. Justice Littledale, Mr. Justice Patteson,

and Mr. Justice Coleridge, and the judgment of the Court was delivered by Mr. Justice Littledale, he said:—"Whether the Judicial Committee were right in decreeing Mr. Smyth to appear absolutely or not is a question of practice not of jurisdiction. The temporal Courts cannot take notice of the practice of the Ecclesiastical Courts, or entertain a question whether in any particular cause, admitted to be of ecclesiastical cognizance, the practice has been regular. The only instances in which the temporal Courts can interfere, by way of prohibiting any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court." (1) Not satisfied with this decision, Mr. Smyth made a similar application to the Court of Exchequer. Lord Abinger said that he would give no opinion as to whether prohibition would lie to the Judicial Committee, and went on as follows:—"It is alleged that the Judicial Committee have come to a wrong decision upon a matter in which they have jurisdiction. They have the power to remove the suit into their own Court, and to take cognizance of it, and to make decrees and orders respecting it.—That being so, if they have fallen into any error, whether in some interlocutory matter, or in their final judgment, we cannot remedy it or entertain an appeal from their decision.—We cannot afford any redress; for if there be any mistake in the proceedings it is in a point of practice, which cannot be the ground of a prohibition." In the same case Baron Parke expressed himself thus: "The Judicial Committee had jurisdiction in this case, which is all we are bound to watch over with respect to inferior Courts.—The Judicial Committee retained the cause, and thus obtained what may be termed an original jurisdiction, and then they ordered Mr. Smyth to appear absolutely. I give no opinion on that order; but whether right or wrong, it was a step taken in the cause by a Court having competent jurisdiction." Baron Alderson added: "If they have done wrong, it is in a matter over which they had jurisdiction, and which regards the practice of their own Court, and which cannot, therefore, be the subject of a prohibition." (2) To this judgment Baron Gurney assented, and we have, therefore, the

(1) 3 A. & E. 719, at p. 724. (2) Tyr. & Gr. pp. 222, 226.

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deliberate opinion of no less than seven judges to add to that of Mr. Justice Lush, in support of the proposition that the temporal Courts have no right or power to inquire into and review the procedure or the practice of the Ecclesiastical Courts, but only to restrain them from entertaining matters which, by reason of their nature, are not within their proper jurisdiction. But I must cite yet another and still more modern authority. The case of *Ex parte Story* (1), occurred in A.D. 1852. It was an application, on Mr. Story's behalf, for a writ of prohibition to the Consistorial Court of London. His complaint was, that in a matrimonial suit, two decrees ordering him to receive his wife and to pay alimony, had been made in his absence and without previous notice to him. The application was refused. Baron Alderson said: "The Ecclesiastical Court had jurisdiction over the subject-matter of the suit, and we cannot assume that it has acted in this instance without jurisdiction. Every Court must necessarily be intrusted with the control over its own rules of practice. If that were not so, the proceedings in the Courts would continually be subject to be stayed by prohibitions, supported by the rash oaths of the suitors." And Baron Parke said: "The case is strictly analogous to the Marshalsea case, and falls within the principle of law which is there expounded, namely, that when a Court has jurisdiction over the suit, and proceeds inverso ordine, or erroneously, neither the party suing nor the officer, is liable to an action at the suit of the party affected by the proceeding. There is no doubt that here the Ecclesiastical Court has jurisdiction over the suit, but if any proceeding of an irregular nature has taken place in that suit, it does not take away the jurisdiction of the Court, but merely gives the party a remedy by application to the Court itself, or by appeal. The case of *Ex parte Smyth* (2) is in principle expressly in point." Nor could an opposite opinion be for a moment entertained, unless an extension and significance were given to the word "jurisdiction" at variance with its natural and proper meaning.

That any given Court should have power to correct and punish a particular offence in a particular person, it is necessary that the offence itself should be of a nature to fall within its jurisdiction—

(1) 8 Exch. 195. (2) 3 A. & E. 719.

that the person should be subject to its jurisdiction—and that the punishment awarded to him should be one which the Court is competent to inflict for that offence. These things constitute "jurisdiction." But where they exist—the method of bringing the defendant into Court—the form in which the offence is charged against him—the particular forms in which facilities are provided for his defence—the specific rules under which each step in the suit is taken—these things which are but the machinery by which justice is administered, lie widely apart from the right and "jurisdiction" to administer it, and to confound them together in the common use of the word "jurisdiction" is, I think, a misapplication of terms sufficiently obvious. For these reasons, and on these authorities, it appears to me that the Queen's Bench Division has wrongfully "usurped" (to use the expression of the Lord Chief Justice) in this case of Mr. Mackonochie, a right to inquire into and decide upon the practice of this Court.

But I will now proceed to shew that the view of that practice taken in the judgment of the Lord Chief Justice is utterly unfounded in fact. I will not quote that learned judgment at large. It is enough to point attention to the specific propositions which it asserts.

The first proposition is that which I have before stated, namely, that a monition not to offend in like manner again cannot, according to the practice of the Ecclesiastical Courts, be appended to a sentence awarding punishment for an offence already committed. Now, in dealing with this proposition, the Lord Chief Justice has in the very outset fallen into a signal and unaccountable error of fact. He is clearly under the impression that the Judicial Committee, in deciding the former suit against Mr. Mackonochie and the suit against Mr. Purchas, had done this very thing—that is to say, had appended a monition to a sentence of punishment—for he says that Sir Robert Phillimore, in taking that course in this suit against Mr. Mackonochie had "*done no more than follow the precedents set by the Judicial Committee.*" But the contrary is the fact—as indeed will be perceived from the Lord Chief Justice's own statement in a later part of his judgment of the proceedings taken in these cases—from which it appears that the Judicial Committee did not pass any sentence of punish-

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ment for the offences charged in the articles, but only admonished the defendant. The punishment of suspension afterwards awarded by them was awarded for not obeying that monition and repeating the original offence. This remarkable mistake, however, only shifts the burden of having "usurped" this method of proceeding (now denounced as novel) from the Judicial Committee to the shoulders of Sir Robert Phillimore. But it cannot rest there, because if the case of *Fendall* v. *Wilson* (1), which was decided on the 15th of December, 1862, by Dr. Lushington is referred to, it will be found that he, who during a long life had an almost exceptional acquaintance with ecclesiastical practice, did the very same thing. The suit arose in the Arches Court by letters of request, and was instituted for false doctrine. Dr. Lushington found the charge proved, and sentenced Mr. Wilson, to a suspension for one year ab officio et a beneficio, and in addition "admonished" him not to repeat his offence.

In a similar case of the *Bishop of Salisbury* v. *Williams* (1), arising in like manner upon letters of request, and which was argued and dealt with by the Court about the same time, Dr. Lushington did precisely the same thing. I will now go back thirty years, to a time when the Arches Court was presided over by Sir John Nicholl. In the year 1830 the suit of *Field* v. *Cosens* (2) was decided. It was a criminal suit brought by letters of request from the Consistorial Court of Chichester, and the offence charged was that of brawling. An affirmative issue having been given, Sir John Nicholl suspended the defendant ab ingressu ecclesiæ for one month, "admonished" him, and condemned him in costs. Again, in the year 1826, in a criminal suit promoted by the Rev. Henry Turmine against George Clarkson for brawling, Sir John Nicholl suspended the defendant ab ingressu ecclesiæ "for the space of one fortnight," and admonished him "to refrain in future from offending in like manner, under pain of the law and contempt thereof." The sentence of the Court is set out at full length in Mr. Coote's book on the Practice of the Ecclesiastical Courts, at p. 253, as an ordinary precedent in cases of that character. I will take another instance in Sir John Nicholl's time; it occurred as early as the year 1816. The name of the case is *Blackmore* v.

(1) 2 Moo. P. C. C. (N.S.) 375. (2) 3 Hagg. Ecc. 178.

Brider. (1) The suit came by letters of request from the Commissary of Chichester, and it was a criminal suit charging the defendant with having married and cohabited with the daughter of his former wife by a former husband. Sir John Nicholl held the charge to be proved, declared the marriage void, sentenced the defendant to do penance as a punishment, and "admonished" him to live separate from the woman in question for the future. The sentence is set out at length in the notes to the case. The judge pronounced that "William Brider and Mary Walter ought to be *strictly and under pain of the law* 'admonished' to separate from each other, and to *abstain* for the future from all pretended matrimonial, incestuous, and unlawful cohabitation with each other, and we do by these presents so admonish them." Here, therefore, again was a sentence of punishment, and in addition an admonition to "abstain" from the offence in future, "under pain of the law." What these latter words, "under pain of the law," meant is apparent from the next case which I am about to cite—a case which has the great authority of Lord Stowell—*Burgess* v. *Burgess* (2), occurred in the year 1804. It was, like the last case, a criminal suit charging incestuous cohabitation. Lord Stowell held the articles proved. In consideration of the age and infirmity of the party he forbore to pass the sentence of penance, which he said was the usual punishment, but condemned him in costs, and "admonished" him not to continue the intercourse. The parties, he said, "must live in future separate and apart, and *if obedience be not given to this order, excommunication and other consequences will necessarily follow.*" I will conclude this continuous line of modern authorities with one more case taken also from the reports of Lord Stowell's decisions. The case of *Cox* v. *Goodday* (3) is to be found in the Consistory Reports. It occurred in A.D. 1810, and was a criminal suit, in which articles were exhibited against the Rev. William Goodday for brawling. The defendant having given an affirmative issue to the articles, was sentenced by the Court to a suspension ab officio for a fortnight, and was also "admonished" not to offend in future.

Here, then, is a series of cases, beginning as early as 1804, in

(1) 2 Phillim. 359, 362. (2) 1 Cons. Rep. 384.
(3) 2 Cons. Rep. 138.

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which the practice of passing a sentence of punishment, and adding thereto a "monition" or injunction to abstain from the like offence in future, has been adopted and acted upon throughout this century, and by the most eminent judges who have presided in the Arches Court during that period of time. This period of time, it is to be observed, covers the whole time during which any reports of ecclesiastical cases are in existence; excepting perhaps, the notes of Sir George Lee in the middle of the last century; but if any previous reports existed, can any doubt be entertained that the same thing would constantly appear to have happened?

The cases collected by Mr. Rothery, and published in the form of a return to the House of Commons, carry this same practice further back by the space of another century. The case No. 98 occurred in the year A.D. 1692. It was a suit commenced in the Consistory Court of Gloucester for an incestuous marriage and cohabitation by Richard Orchard with his father's widow. There was an appeal to the Court of Arches, and thence to the Delegates. The Delegates pronounced sentence against the appeal, and "declared that the said pretended marriage was ab initio null and void, and separated, divorced, and absolved the appellants therefrom, and further sentenced them to be canonically corrected, and to perform salutary and condign penance. They also condemned the appellants in costs in all the Courts. A monition was also decreed forbidding the appellants to consort together except in public." Indeed so completely an established practice has it been to admonish for the future, as well as correct and punish for the past, that a prayer by the promoter that the Court would so deal with the defendant is to be found in the common form of articles used in this Court in criminal suits. In Mr. Cootes' Book of Practice, p. 222, is a form of articles given as a precedent against a layman for brawling, which concludes in this manner, "and that you be duly and according to the exigency of the law corrected and punished for the same, and admonished to refrain from the like behaviour for the future." And accordingly in the articles exhibited in this very suit against Mr. Mackonochie, the prayer of the promoter is that the defendant be "duly and canonically punished according to the gravity of his offence, and likewise 'admonished'

against so offending in future, and condemned in the costs, &c." The articles exhibited in the former suit against Mr. Mackonochie concluded with a prayer in identically the same form. And yet this is the mode of procedure which the Lord Chief Justice asserts to have been "assumed" or "usurped" within the last few years by the Judicial Committee. "Not indeed," he says, "by the judges of the ordinary Ecclesiastical Courts, but by judges of whom, however great and eminent, I hope I may be pardoned for saying that they may be supposed to be less familiar with the administration of the ecclesiastical law." I might perhaps stop here. For this erroneous theory, which the Lord Chief Justice has invented, of ecclesiastical practice underlies (with one exception which I will presently mention) the whole of his judgment, and forms the entire basis of it, so much so, that I will venture to hazard the opinion that, had these cases and this practice been known to him, his decision would hardly have been what it was. But the other proposition which he has asserted, relating to the practice of this Court, is equally without foundation, and is likely to be so misleading to suitors and mischievous to the efficiency of this Court, that I cannot do otherwise than mention it.

An "admonition," he says, in a criminal suit, save where it is issued to compel appearance, or "as a means of furthering the progress of a suit," can only be resorted to as a definitive sentence of punishment for a past offence. And when thus used it cannot be, he contends, "the foundation of any ulterior consequences, but is only a form, however mild, of punishment, the open and public censure, or rebuke of the judge for ecclesiastical misconduct, generally accompanied by the party thus censured being condemned in costs, and to be remembered doubtless as a matter of aggravation should a repetition of the offence occur, but not capable of being used as the foundation of any future proceedings of a summary character on the score of contumacy in case of such repetition." Now it is undoubted that in many instances the Ecclesiastical Courts have satisfied themselves, in criminal suits, with admonishing the defendant to abstain in future from the conduct or neglect which may have been charged against him as an ecclesiastical offence, without adding thereto any specific punishment for the past. The reason of this becomes apparent when the

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nature of these so-called criminal suits is adverted to, and properly understood.

The powers and office of the spiritual Courts are correctional and disciplinary. The primary and professed object of these criminal suits is, not to deter others, but to enforce upon the defendant himself "pro salute animæ," a course of conduct no longer open to ecclesiastical censure. The reformation of the defendant being the avowed object, it is quite as much, or more, the purpose of the suit, from the ecclesiastical point of view, to provide against future misconduct as to punish for past excesses. The language of the citations and of the sentences in use in the Ecclesiastical Courts fully bears out this statement, nor will it be denied by any one conversant with the ecclesiastical law. Such a comparison, therefore, as the Lord Chief Justice institutes between an indictment for larceny, where the prisoner is charged with an offence against the Crown and dignity of the Queen, and is punished for the sake of example; and a suit in this Court against a clergyman for enforcing upon him a due observance of ecclesiastical law in the performance of divine service, is a comparison between two things which at the very foundation have in truth no analogy whatever, and have little or nothing in common but the common name of "criminal." Is it then possible to accept the proposition of the Lord Chief Justice that a "monition" or order of the Court to abstain in future from particular conduct or practices is an order which the Court may make but cannot enforce? Let me glance at some of the cases in which, without any punishment for the past, the Court has thus ordered the defendant to abstain or desist in future. In *Barnes* v. *Shore* (1) the suit, which was a criminal one, came to this Court by letters of request from Exeter. The defendant, a clergyman, was charged with reading services and preaching without a licence in an unconsecrated chapel. Sir Herbert Jenner Fust held the charge proved, did not sentence him to any punishment, but admonished him "to refrain from offending in like manner in future," adding, "should he be guilty of a repetition of this offence it will be one not only against his diocesan but against the authority of this Court" —that is, not only an offence against ecclesiastical law, but a

(1) 1 Rob. Ecc. 382, 399.

contempt of the authority which commanded him to refrain from committing it. Again, in the case of *Hodgson* v. *Dillon* (1) a criminal suit was instituted in the Consistory Court of London against a clergyman for officiating in an unconsecrated chapel without the licence of the bishop. The promoter prayed "that the defendant should be monished to refrain" from so officiating in future, and the judge "admonished" him accordingly. A similar case occurred in A.D. 1789. *Barton* v. *Wells* (2) was a criminal suit against Dr. Wells for officiating in Ely Place Chapel without a licence. Lord Stowell said, "I must therefore pronounce for the jurisdiction of the Bishop of London by decreeing that Dr. Wells has officiated without authority, and direct a 'monition' to issue to him to desist."

Now does the Lord Chief Justice really mean to contend that the monitions issued in these cases were mere rebukes for the past, and that if the clergymen in question had wholly disregarded the orders of the Court, they might have done so with impunity? What authority, I may ask, is there for such a doctrine? The language of the learned judges—of Lord Stowell, who, in the case above-quoted, spoke of "excommunication following" upon disobedience, and of Dr. Lushington, who spoke of disobedience being an offence "against the authority of the Court;" nay, the very language of the monition itself, which commands the defendant to abstain for the future "under pain of the law and contempt thereof" are distinctly at variance with any such proposition.

It is not to be expected that the modern reports would afford instances in which disobedience to these monitions was followed by punishment for contempt. Such a matter, involving the mere exercise by the Court of its ordinary powers for enforcing obedience to its decrees, would not furnish matter for a report. But it happens (again referring to Mr. Rothery's collection of cases in the Delegates) (3) that the older records of the Courts do furnish such instances. The case No. 100, which was a suit by one Mary

(1) 2 Curt. 388.
(2) 1 Cons. Rep. 21, 34.
(3) Return of all Appeals in Causes of Doctrine or Discipline made to the High Court of Delegates . . . Parl. Papers, 199, April 3, 1868.

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Hewetson against a woman named Chamberlayne for adultery with Thomas Hewetson, her husband, was promoted in the Arches Court by letters of request from the Bishop of London. "The Court had previously issued a monition forbidding Thomas Hewetson and Chamberlayne to consort together except in public," and a decree of excommunication was issued against them for not obeying the monition. The Delegates rejected the appeal and issued a similar monition. To this must be added the case No. 82 in which one Jonathan Rutter was excommunicated for continuing to teach as a schoolmaster without a licence, after being monished to obtain one, and warned to desist from teaching without one. The statute, moreover, of 53 Geo. 3, c. 127, which was "an Act for better regulation of the Ecclesiastical Courts in England," &c., is distinctly opposed to the contention that a monition cannot be enforced. For it provides that in all causes in the Ecclesiastical Courts "when any person required to comply with the lawful orders or decrees, as well final and interlocutory, of any such Court shall neglect or refuse to pay obedience to such lawful orders or decrees it shall be lawful for the judge to pronounce such person contumacious and in contempt," and to signify the contempt to the Court of Chancery, with the consequence of imprisonment.

But the most singular aspect of the Lord Chief Justice's proposition remains to be stated. He admits that a monition is a common process in constant use in the Ecclesiastical Courts, both in civil and in criminal proceedings, "as incidental to procedure" and "as a means of furthering the progress of a suit;" and he does not deny that such monitions may be and are universally enforced by the Court if not obeyed, while he asserts that a "monition" forming the definitive sentence of the Court need not be obeyed, and cannot be enforced by the Court. So that there are two kinds of admonitions—one of a peremptory character, not to be disregarded without the liability to punishment, and another of a harmless, and I might add, useless character, which may be set at nought with safety. And yet the "monitions" in all cases are the same, and are formal documents issued under the seal of the Court in precisely similar language;

and in all cases they command a particular thing to be done or abstained from "under pain of the law and contempt thereof."

I have thought it right thus to refute this proposition of the Lord Chief Justice, viz., that the monitions of the Court may be disobeyed with impunity, because if it should go forth to the public with his high sanction, and uncontradicted, it would undermine the authority of this Court in some of its most useful functions.

But I have not lost sight of the fact that, in this suit against Mr. Mackonochie, the further question arises, whether the power of this Court to punish the defendant for disobeying the monition, and repeating his original offence, is limited to the imprisonment authorized by the statute of Geo. III., or whether it extends to punishing him by suspension. Having expressed myself very fully upon this subject on a former occasion I forbear to recur to it. The only remark I have to make upon it is, that the sentence of suspension in Mr. Mackonochie's case was intended to be passed upon him, not only for his contempt in disobeying the monition, but also for his breach of the ecclesiastical laws in the repetition of his original offence. And some pains was taken in drawing up the order of this Court (which I may add was not in existence until after the rule nisi for a prohibition had been granted) to make this intention clear and unambiguous; with what success it remains for others to decide.

One point and one point only it remains to notice, and I notice it the more particularly because, from the report which I have seen of the judgment of the Queen's Bench Division, it appears to have been the one particular point upon which (subject to a general agreement with the Lord Chief Justice) Mr. Justice Mellor rested his judgment.

This Court it is argued has no original jurisdiction, and its jurisdiction in the present case arises solely under the letters of request from the Bishop of London—the bishop it is said could only request this Court to deal with offences committed before the letters of request were issued, and consequently could only confer upon this Court a jurisdiction to punish those offences without regard to the future.

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I pass by the question whether the archbishop has, or has not an original jurisdiction within his province subject to the Bill of Citations (1); and assuming the jurisdiction of this Court to be conferred by the letters of request I will answer the above objection in a few words both on principle and on authority. The bishop, if the suit had been commenced in the Consistory Court, would have had authority not only to punish for the past, but to admonish for the future, such being the practice of the Ecclesiastical Courts; and when the bishop requested the judge of the Court of Arches to institute the suit in his Court, where the same practice prevails, he invoked the exercise in the Court of Arches of the same powers and jurisdiction that he himself would have exercised if the suit had been instituted in his own Court. And with regard to authority I am satisfied with pointing out that the two cases of *Fendall* v. *Wilson* (2), and the *Bishop of Salisbury* v. *Williams* (2), in which Dr. Lushington admonished the defendants not to offend in future, were both cases coming to him by letters of request; as also were the two cases above quoted of *Blackmore* v. *Brider* (3), and *Field* v. *Cosens* (4), in both of which Sir John Nicholl did the same thing—while the practice of the bishop's Court in this matter is evidenced by the case above quoted of *Cox* v. *Goodday* (5), where Lord Stowell did the same thing in the Consistory Court of London.

Having thus vindicated the practice of the Ecclesiastical Courts, and proved the existence during the whole time over which any reports of ecclesiastical cases extend, and even a century earlier, of the very procedure which the Lord Chief Justice has denounced as a modern invention, I may very properly I think pass by without comment the following exhortations to judicial duty.

A judge "cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion." "It may be that this summary jurisdiction would be exceedingly useful, in order to prevent erratic clergy-

(1) 23 Hen. 8. c. 9.
(2) 2 Moo. P. C. C. (N.S.) 375.
(3) 2 Phillim. 362.
(4) 3 Hagg. Ecc. 178.
(5) 2 Cons. Rep. 138.

men from setting the law at defiance, and retaining benefices in a Church, the rules and ritual of which they habitually disregard, if the legislature should think proper to create it. But its possible utility affords no justification for usurping it, and expediency is a new and, I must say to me, strange ground to assign for upholding the exercise of assumed judicial authority when it cannot be shewn to exist in point of law." The imputation here apparently conveyed is, that the Ecclesiastical Courts have wilfully overstepped their legal authority, and adopted a novel procedure because it was "exceedingly useful"—I say apparently—for I should be as little willing to believe that this was the real meaning of the Lord Chief Justice, as I should be to suppose, that in the novel power which he has himself "usurped" he contemplated a useful means of extinguishing the Ecclesiastical Courts. But I must be permitted to draw one practical lesson from the Lord Chief Justice's misconception of ecclesiastical practice. Speaking of himself he says, "I had to deal with a branch of law with which as a common law judge I am of course, though I have taken the utmost pains to make myself master of the authorities, less familiar," and again he says, "I have gone carefully through all the writers—certainly all the writers of authority—who have written on the subject of ecclesiastical jurisdiction since the Reformation; and have not only found no authority for the exercise of such a power but not even a trace of it." That after a search so laborious, a practice, which has all along been familiar in these Courts, should have escaped attention—and that it should have been possible to compare, as analagous to one another, these disciplinary suits in the Ecclesiastical Courts with indictments for breaches of the criminal law, must afford matter for surprise. But what a light does it not shed upon the system newly asserted of a Court whose function it is to administer one branch of the law, sitting in judgment upon the practice and procedure of another Court which administers a wholly different branch of the law! And if the highest ability—the most extended industry—and what all must know to be the most earnest desire and intention, to arrive at a right conclusion, can only produce a result so much to be deplored, what hope will there be in future for

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the Ecclesiastical Courts, when their practice may come to be handled by ability less exceptional, and with industry less marked?

I cannot close these observations without a word upon what has been called the "summary" nature of the proceeding under which Mr. Mackonochie has been punished. For my own part, I should be loth to adopt any procedure, unless absolutely forced upon me by the law, even though it were "exceedingly useful," if it bore unjustly on the defendant, or diminished in any degree his means or opportunities of legitimate defence. "Though a murderer should be taken red-handed in the act," says the Lord Chief Justice, "if there is a flaw in the indictment, the criminal must have the benefit of it." Alas, that this should be so! For this species of defence I have, I confess, no sympathy. The picture of law triumphant and justice prostrate, is not, I am aware, without admirers. To me it is a sorry spectacle. The spirit of justice does not reside in formalities, or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be, but the handmaid of justice, and inflexibility, which is the most becoming robe of the latter, often serves to render the former grotesque. But any real inroad upon the rights and opportunities for defence of a person charged with a breach of the law, whereby the certainty of justice might be imperilled, I conceive to be a matter of the highest moment. I am therefore not contented with having shewn these proceedings to be sanctioned by ecclesiastical law, without pointing out in addition that they are wholly consonant with justice. The word "summary" is apt to convey a false impression. In the Criminal Courts of the country to convict by a "summary" proceeding is to withdraw from the defendant the advantage of a jury. In the Common Law Courts, to deal with a matter "summarily on motion," implies the substitution of affidavits for witnesses, and very often the exclusion of an appeal. But the so-called "summary" proceeding against Mr. Mackonochie in this Court has excluded nothing—it has deprived him of no advantage—and placed him in no respect in a different position from that which he would have occupied

had his offences been adjudicated upon under a fresh set of articles in a fresh suit. Had Mr. Mackonochie chosen to appear, he would have had the same opportunity of calling witnesses, the same opportunity of arguing any points of law, and the same means of defending himself in all respects as the proceedings in a fresh suit would have given him. The Lord Chief Justice, indeed, says he would have had no appeal; but this again is surely an error, for all orders of this Court, however trifling, were by the old ecclesiastical law matters of "grievance" and appeal, and the Church Discipline Act gives an absolute right of appeal against all definitive sentences, and an appeal with leave of the judge (which is never refused unless purely vexatious) against all interlocutory orders.

The whole difference, then, between the procedure which has been adopted, and that which the Lord Chief Justice says should have been adopted, lies in this: that if a fresh suit had been instituted, Mr. Mackonochie's offences would have been charged against him in the formal language of a paper headed "Articles," whereas in the present suit the same offences were charged against him in language equally precise and definite in a paper headed "Notice of Motion," this latter being accompanied by an advantage which fresh articles would not have given him, namely, the affidavits of the witnesses who were to prove the case against him. On the other hand, the additional expense and delay which a fresh suit necessarily to some extent involves are avoided, and thus the designation of "summary," the meaning of which in these cases is reduced to "speedy and inexpensive," instead of being a reproach to this form of proceeding, is very much to its credit. The further objections which have been ingeniously suggested against it, namely, that the defendant might have removed to another benefice out of the original diocese, or (what would be a more formidable consideration) out of the province, may be properly dealt with when such a case arises. In such a case, as also in case of a great lapse of time after the issuing of the monition before it was disobeyed, it would be quite competent to the Court to require a fresh suit before taking compulsory or penal measures.

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These considerations make it abundantly clear, I think, that this form of proceeding by "monition," which is analogous to the procedure by injunction, or perpetual injunction, in the Courts of Equity is conformable to justice, while it is not opposed to the security or even the interests of a defendant. This, though it forms no reason for adopting it without the sanction of the law, is a very good reason for upholding it when it has, as I have already shewn it has, that sanction. And with regard to the criminal aspect of these suits against clergymen, it is not out of place to remember, that the nature of the punishments inflicted in them, even in extreme cases, does not extend beyond a deprivation of their preferment in a Church whose constitutions and laws they may have violated, and in the case of significavit an imprisonment which terminates as soon as they declare themselves willing to conform to those laws.

I have dwelt thus at large upon the judgment pronounced in Mr. Mackonochie's case, because I conceive that the independence of this tribunal demanded an adequate protest against the invasion thereby made upon it. But the Queen's writ of prohibition, however unadvisedly issued, must command both obedience and respect. And as I cannot proceed to punish Mr. Edwards, the defendant in this case, by imprisonment without the chance of running counter to the principles which have been acted upon in the case of Mr. Mackonochie, and possibly, if not probably, inviting another prohibition, I think it best, for all parties, to hold my hand and decline to proceed to compulsory measures at present.

Proctors for promoter: *Moore & Currey.*

THE CLEOPATRA. (D. 364.)

1878
April 16.

Salvage—Derelict—Amount of Award—Apportionment.

A vessel constructed entirely for the purpose of conveying the obelisk known as Cleopatra's Needle from Alexandria to England, was, with the obelisk on board her, abandoned in the Bay of Biscay by her master and crew, and by the steamship employed to tow her to England, and the next day was found floating on her beam ends about ninety miles north-east of Ferrol by another steamship, which succeeded in towing her into Ferrol in safety.

Subsequently an action of salvage was instituted to determine the amount of salvage remuneration to be paid to the salvors for the services rendered, and bail was given in the action in the sum of 5000*l.* By the consent of all parties, the judge in Court fixed the value of the property salved at 25,000*l.*

At the hearing of the action, the Court awarded 2000*l.* as salvage remuneration to the plaintiffs, and on a subsequent application apportioned the award as follows:—1200*l.* to the owner of the salving vessel; 250*l.* to her master, and the residue to be distributed among her crew according to their rating, and services as salvors.

THIS was an action of salvage, in which the plaintiff, John Dixon, the owner of the *Cleopatra* and the contractor for the conveyance of the obelisk known as Cleopatra's Needle from Egypt to the Thames, claimed that the Court should adjudicate upon a dispute between himself and the owner, master, and crew of the steamship *Fitzmaurice*, with respect to the salvage remuneration to be awarded for salvage services rendered in October last, when the *Cleopatra*, with the obelisk on board, had been found by the *Fitzmaurice* derelict in the Bay of Biscay, and had been taken in tow by that vessel and towed in safety into the port of Ferrol.

On the 30th of November the owner, master, and crew, of the *Fitzmaurice* appeared in the action, and on the 19th of December Mr. Dixon, who had in the meantime delivered a statement of claim, put in bail to answer judgment in the sum of 5000*l.*

On the 5th of April the salvors delivered their statement of defence. Such statement of defence, after alleging that at the time of the services rendered the value of the *Fitzmaurice*, her cargo, and freight, was 10,778*l.*, or thereabouts, and setting forth the details of such services proceeded, in substance, as follows:—

40. By the services of the defendants the *Cleopatra* and the Needle on board her were saved from total loss, and the plaintiff has been enabled to earn the

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freight or the reward payable to him for the carriage of the Needle from Alexandria to England.

41. The said services were of a very difficult and arduous nature, and in rendering them the *Fitzmaurice* and her master and crew incurred great danger.

43. The said Needle was and is of great value. The freight or reward payable to the plaintiff for the carriage of the Needle to England, amounted to the sum of 10,000*l.*

44. The plaintiff admits that he is liable to the defendants in respect of all their services, including their services to the Needle itself.

Mr. Dixon, in his reply, admitted the 44th paragraph of the statement of defence, but denied the truth of the allegations contained in the 43rd paragraph, and alleged in substance that he had contracted at his own expense and risk to transport the obelisk to London and erect the same uninjured in a vertical position in one piece, together with certain adjuncts, on a site to be agreed upon on or before the 1st of January, 1879; that on, and not before the due completion of the above contract, he was to be paid a consideration of 10,000*l.*; that at the time of the services rendered by the salvors, he had incurred expenses in or about the transportation of the obelisk, amounting to the sum of 6983*l.* 13*s.* 3*d.*, and that the total cost of transporting and erecting the obelisk in accordance with the terms agreed on, would amount to the sum of 15,000*l.* or thereabouts.

On the 5th of March, counsel on behalf of the salvors moved the judge in court to order an appraisement of the *Cleopatra* and the obelisk, and after some discussion it was arranged, with the consent of counsel, that the question as to the value of the vessel and the obelisk should be referred to the judge, who thereupon directed that the value thereof for the purposes of the action, should be taken at the sum of 25,000*l.*

March 30; April 1. On these days the action was heard before the judge, assisted by two of the Elder Brethren of the Trinity House.

Witnesses were examined orally in court.

Sir Henry James, Q.C., and *E. C. Clarkson*, for the owners, master, and crew of the *Fitzmaurice*.

Butt, Q.C., *G. Bruce*, and *Hollams*, for Mr. Dixon.

The result of the evidence can be gathered from the judgment.

Cur. adv. vult.

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April 6. SIR ROBERT PHILLIMORE. In this case, in order to avoid confusion between the term plaintiff and defendant, it is proper to observe that the action is brought by the owner of the salved property, seeking, under the 460th section of the Merchant Shipping Act, 1854, to have the salvage services rendered to his property adjudicated upon by the Court. The *Fitzmaurice*, a screw steamship of 297 tons register, was proceeding on her voyage from Middlesborough to Valencia with a cargo of pig iron, and a crew of sixteen hands, when on the 15th of October, 1877, between five and six in the evening, about ninety miles north-east of Ferrol, a port on the north-west coast of Spain, her look-out reported some object floating to leeward, apparently the wreck of a vessel. The weather was very heavy, and there was a very high sea running at the time. The *Fitzmaurice* made towards the object, which was discovered to be the *Cleopatra* lying on her port beam ends, and abandoned by her crew. The *Cleopatra* was a vessel built in compartments, about ninety-five feet long from stem to stern, the breadth of her beam being fifteen feet. The obelisk on board her weighed 187 tons. The *Cleopatra* was constructed entirely for the purpose of conveying the obelisk from Egypt to England. She was, as described in the ninth paragraph of the statement of defence, "like a ship's boiler with a bridge in the middle." There was ballast consisting of railway iron weighing about twenty tons, which was put in merely to trim the ship fore and aft.

According to the evidence of the captain of the *Cleopatra*, she had been towed by the steamer *Olga* from Alexandria to about 132 miles N.N.E. of Cape Finisterre. The weather, previously to the 14th of October, had been extremely tempestuous, and on that day the *Olga* was obliged to cast off the tow rope of the *Cleopatra*. The *Cleopatra* had rolled and pitched so much that it was with great difficulty that the iron rails were partially replaced. She made no water. Her captain said that he stood by her to the very last moment, and abandoned her only on the 15th of October, when he saw the greatest danger threatening himself and his crew. On Monday morning the boat of the *Cleopatra* was hauled by means of ropes to the side of the *Olga*, and her crew were put in safety on board that vessel. It is a most melancholy incident in the case

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that the *Olga* during the night had sent a boat with six men to the *Cleopatra*, all of whom were lost, and the boat apparently missed the ship, and must have been swamped in the tremendous sea that was then running. Those on board the *Olga*, concluding the *Cleopatra* to have foundered, went on to Falmouth.

It was about six o'clock in the evening of the 15th that the *Fitzmaurice* came up to the *Cleopatra*, which was then lying on her port beam ends, and, to use the expression of the master of the *Fitzmaurice*, with her bridge continually "swashing into the water" every roll she made. The master ordered the chief officer to get the boats ready, but he remonstrated so strongly upon the danger that would be incurred that the order was recalled, and there were no volunteers for the service that night. The *Fitzmaurice* steamed close up to the *Cleopatra*, and kept her in sight all night. About six o'clock next morning a boat was got ready, but the crew were very reluctant to embark in her. At last three of them, with the chief officer, volunteered, and a boat was put overboard, in which they pulled round the *Cleopatra*. There was a very heavy sea. The *Cleopatra* was continually "slapping her bridge into the water," and was on her beam ends as on the night before. Two of the men rowed and two made ready to jump on her bridge, which was their only chance of getting on board her, on account of the peculiar construction of her deck. After a series of vain attempts for upwards of an hour and a half, the chief officer at last succeeding in getting on board the *Cleopatra*. A deep sea line was then got on board the *Cleopatra*, and fastened to the hawser of the *Fitzmaurice*. The difficulty of the operation was greatly enhanced by the fact that the *Cleopatra* had a circular as well as a rolling motion. This was a consequence of her rudder head being broken off, and the chain having become entangled. According to the evidence she went round all the points of the compass four times in fifteen minutes. To this difficulty was added another. A portion of the tow line of the *Cleopatra* was hanging under water fast to a shackle low down in the stem of the *Cleopatra*, with a chain bridle attached to it. Both these impediments to the navigation of the *Cleopatra* were overcome by the skill and courage of the salvors, who, being lashed by a rope to the rail, were often wholly submerged in the water in the process of clearing away these

obstacles from the stem and stern of the vessel. No less than three times volunteers were mustered on deck to perform these services, which at last being completely successful, and two hawsers having been made fast to the *Fitzmaurice*, the *Fitzmaurice*, after undergoing various minor misadventures, brought the *Cleopatra* in safety to Ferrol on Wednesday, the 17th of October, about 9 P.M., making fifty-two hours' service from the time the *Cleopatra* was first seen at 5·30 P.M. on Monday the 15th of October, and a towage of ninety-three miles.

A good deal has been said on the subject of the nominal plaintiff's but real defendant's position in this Court. It is not denied that so far as this case is concerned he is to be considered as owner of the salved property with all the liabilities incident to it. Much eulogy has been bestowed by counsel on both sides upon his generous patriotism in securing for his native country, perhaps at considerable expense to himself, this interesting historical monument. I have no doubt that Mr. Dixon deserves all the praise which has been given him, and I hope that measures will be taken to make good any pecuniary loss which he may incur in consequence of this suit; but I cannot allow any consideration of the kind to influence my award of salvage. The salvors have done bravely and well a difficult and dangerous work, and have a right to be well remunerated. The principles upon which such remuneration is awarded are well known in this Court, but having regard to the arguments of counsel it may be as well to re-state them in this instance. Perhaps the language of that experienced and learned judge, Sir John Nicholl, in the case of *The Clifton* (1) contains as good a summary of these principles as can be found. In delivering judgment in that case he said:

> Now salvage is not always a mere compensation for work and labour; various circumstances upon public considerations, the interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are, first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow subjects; secondly, the degree of danger and distress from which the property is rescued—whether it were in imminent peril, and almost certainly lost, if not at the time rescued and preserved;

(1) 3 Hagg. 117, 120.

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thirdly, the degree of labour and skill which the salvors incur and display, and the time occupied. Lastly, the value. Where all these circumstances concur, a large and liberal reward ought to be given; but where none or scarcely any take place, the compensation can hardly be denominated a salvage compensation, it is little more than a mere remuneration pro opere et labore.

The peculiar character of the property salved presented some difficulty in the application of the last of these elements of salvage remuneration. In ordinary cases the marketable value of the property salved is easily ascertained. It is estimated, and, if necessary, appraised by skilled persons. It cannot be said perhaps with strict truth that this obelisk has no marketable value. In the affidavit of Mr. Burrell, the owner of the *Fitzmaurice*, now before me, which has not been answered, it is credibly stated that Glasgow and other great cities, to say nothing of the towns in America, would be willing to give large sums for the possession of this remarkable monument of antiquity; but still the marketable value of it for the purposes of this action was not easily ascertained. It was agreed by both parties, without any suggestion from me, that the value of the property salved should be fixed by the Court.

Apart from the consideration of the mere immediate marketable value, I have had to bear in mind the æsthetic, if I may use the term, value of the object. Its antiquity is undoubted, at least I am informed the inscriptions testify to its existence not less than sixteen hundred years before the birth of our Lord. It was transferred from On to Alexandria by the Emperor Augustus, and obtained its name of Cleopatra's Needle in honour of that memorable queen. To appraise the value of such an object as so much granite would be as absurd as, in the case of the salvage of a painting by Raffaelle or of a sculpture by Michael Angelo, to estimate the value at the cost of the canvas and frame in the former, or of the mere marble in the latter, case. The obelisk is an object which if once lost could never be replaced. It is a unique historical monument; within eighteen inches of the height of the Luxor Obelisk in the Place de la Concorde at Paris, which is said to have cost the French Government not less than 80,000*l*. Taking these things into consideration I fixed the value, on which I have now to make my award, at 25,000*l*.

Bearing in mind that the property was wholly abandoned by the

owner, and that it was saved by great courage, labour, and skill, exhibited in circumstances of considerable peril, and that in the opinion of the Elder Brethren if the *Cleopatra* had been struck in her derelict state she would certainly have been sunk, besides occasioning great peril to the ship that came in contact with her, I think I shall do right in awarding the sum of 2000*l.*, with costs.

April 16. *E. C. Clarkson*, on behalf of the salvors, moved the judge in Court to apportion the sum of 2000*l.* awarded for salvage in the action.

Hollams, on behalf of Mr. Dixon, applied that leave be given to pay the total amount awarded into the hands of the salvors' solicitors for distribution.

SIR ROBERT PHILLIMORE. I shall make the following apportionment in this case: I award 1200*l.* to the owner of the *Fitzmaurice* and 250*l.* to the master of that vessel. There will then remain 550*l.*, and this sum is to be divided in shares among the remaining salvors in proportion to their ratings on board the *Fitzmaurice*. Double shares are to be allotted to the chief mate and the crew of the boat which first boarded the *Cleopatra*, with the exception of the man who was slung over the bows of the *Cleopatra*, and succeeding in clearing away the tow rope by which the *Cleopatra* had previously been towed. To this man three shares are to be given. The total amount of the award may be paid to the solicitors for the salvors for distribution according to the apportionment. There will be no order as to the costs of this application.

Solicitors for Mr. Dixon: *Argles & Rawlins.*
Solicitors for the salvors: *Gellatly, Son, & Warton.*

1878
June 25.

THE NELLY SCHNEIDER. (1877. W. 294.)

Co-ownership—Sale of Ship in invitum of a Majority of Part-owners—The Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 8.

Since the passing of the 8th section of the Admiralty Court Act, 1861, the Court has a discretionary power to order the sale of a vessel proceeded against in an action of co-ownership, notwithstanding that the sale is opposed by the majority of the co-owners.

THIS was an action of co-ownership instituted on behalf of John Williams, John Swainson, and William Swainson, against the British vessel *Nelly Schneider*. An appearance in the action was entered for the remaining part-owners of the vessel, who gave bail to answer judgment in the action. The statement of claim, after stating that the plaintiff, John Williams, was owner of nine sixty-fourths of the *Nelly Schneider*, and each of the two remaining plaintiffs owners of one sixty-fourth share therein, contained allegations to the effect that in the year 1876, during the building of the *Nelly Schneider*, the plaintiff, John Williams, had applied to Joseph Fisher, one of the defendants, to be appointed master of the vessel; that Joseph Fisher was the intended managing owner of the *Nelly Schneider*, and had promised to appoint John Williams master, provided that the said John Williams would purchase and become the owner of nine sixty-fourth shares in the vessel and find purchasers for three other sixty-fourth shares therein; that the plaintiff, John Williams, agreed to these terms, and having himself purchased and become owner of nine sixty-fourth shares of the vessel, and procured the plaintiffs, John Swainson and William Swainson, and one of the defendants each to purchase, and become owners of one sixty-fourth share of the vessel respectively, was duly appointed master of the vessel; but after the vessel had made divers voyages under his command had been wrongfully, and against the wishes of the plaintiffs, John and William Swainson, discharged by the said Joseph Fisher from his employment, though the said John and William Swainson had purchased and become owners of their respective shares in the vessel upon the faith and understanding that the plaintiff, John Williams, was to be her master.

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The statement of claim then proceeded as follows:—

5. The defendant, Joseph Fisher, has sent the *Nelly Schneider* upon a voyage not approved of by the plaintiffs.

6. In consequence of the wrongful discharge of the plaintiff, John Williams, he claims and is proceeding in this court for the recovery of damages against the *Nelly Schneider*.

7. Accounts relating to the ownership and earnings of the *Nelly Schneider* are outstanding and unsettled between the plaintiffs respectively and the said Joseph Fisher as managing owner of the *Nelly Schneider*.

8. The plaintiffs respectively do not approve of the *Nelly Schneider* being employed otherwise than under the command of the plaintiff John Williams.

The statement of claim concluded by claiming that, in the event of the *Nelly Schneider* not being brought back to this country pursuant to the bond given in the action, such bond be declared forfeited, and all necessary relief thereon given to the plaintiffs; that the defendants might be ordered to bring the *Nelly Schneider* back to this country upon the completion of her present voyage; that she might be sold by the marshal and the proceeds of sale divided among her owners in the proportions to which they might be entitled thereto; and that the accounts between the plaintiffs and the defendant, Joseph Fisher, might be referred to the registrar and merchants, and the defendants and their shares in the proceeds of the sale of the vessel condemned in any sums reported due to the plaintiffs respectively.

The defendants, in their statement of defence, denied the allegation in the statement of claim with respect to the terms under which the plaintiff, John Williams, had been appointed master of the *Nelly Schneider*, and alleged that the discharge of such plaintiff had been done rightfully and for reasonable cause, and, further, that there were no co-ownership accounts relating to the *Nelly Schneider* outstanding and unsettled, other than such accounts as would be regularly rendered at the end of the then next half year, whilst no application had been made before the institution of the action for any accounts to be rendered or settled.

The 5th paragraph of the statement of defence was in terms as follows:—

The defendants submit that this action, except so far as it sought and seeks bail for the safe return of the *Nelly Schneider* should be dismissed with costs.

On the 3rd of April, 1878, an action of wages and disbursements

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THE NELLY SCHNEIDER.

against the *Nelly Schneider*, entitled the *Nelly Schneider*, 1877, W. No. 285, being the proceedings referred to in the sixth paragraph of the above-mentioned statement of claim, came on to be heard before the judge in Court, and after the plaintiff John Williams, and the above-mentioned John and William Swainson had been called as witnesses, and given evidence in support of the plaintiff's case therein, was adjourned by the Court for the purpose of a compromise being arrived at. The evidence then given by the plaintiff, John Williams, in effect went to establish the truth of the allegations contained in the statement of claim in the present action, whilst the evidence given by John and William Swainson proved in substance that, when they had taken shares in the *Nelly Schneider*, they had done so under the understanding that the plaintiff was to be the master of the vessel, and that it was contrary to their wishes for him to have been dismissed from his employment as master.

April 4. The present action came on to be heard before the judge in Court.

Butt, Q.C., and *E. C. Clarkson*, for the plaintiffs.

Milward, Q.C., and *Bucknill* (*W. G. F. Phillimore* with them), for the defendants.

The plaintiff, John Williams, was called as a witness, and proved that the evidence given by him in the above-mentioned part-heard action of wages and disbursements against the *Nelly Schneider* was true.

The counsel for the plaintiffs then submitted that the circumstances of the case required that the Court should exercise the power conferred on it by the 8th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), and decree a sale of the whole ship in the event of the defendants not being willing to purchase the plaintiffs' shares at a valuation.

The counsel for the defendants declined to consent to such an order being made.

SIR ROBERT PHILLIMORE. The Court has full power to decree a sale of the ship, but it will be very reluctant to do so at the instance of part-owners not possessing a majority of shares. In

the present case I think it will be to the interest of all parties to the action that some arrangement should be come to between them. The course suggested by the counsel for the plaintiffs does not seem to be an unreasonable course to adopt, and I shall make this decision in this case:—I shall order that a valuation of the shares now held by the plaintiffs in the vessel be made; that a copy of such valuation be filed in the registry, and that thereupon the defendants have the option allowed them of purchasing such shares at the amount fixed by the valuation. If the defendants do not exercise this option within a fortnight, the ship must be appraised and sold by the marshal.

April 5. *Bucknill,* on behalf of the defendants, stated to the Court that the defendants were not prepared to exercise the option of purchasing the plaintiffs' shares of the vessel at a valuation.

E. C. Clarkson, on behalf of the plaintiffs, applied for an order of appraisement and sale.

SIR ROBERT PHILLIMORE. The plaintiffs' application must be granted. The vessel will be appraised and sold when she comes back to England after her return from her present voyage.

June 25. The judge, with the consent of the counsel for the plaintiffs and the defendants, directed a warrant to issue for the arrest of the *Nelly Schneider,* and decreed that she should be appraised and sold.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Ingledew, Ince, & Greening.*

1878
July 8.

THE HENRY COXON. (1878 M. 11.)

Evidence—Collision—Non-admissibility in Evidence of Log kept by Mate who has subsequently died—Deposition before Receiver of Wreck—Merchant Shipping Act (17 & 18 *Vict. c.* 104), *s.* 448.

Two vessels, the *H.* and the *G.*, came into collision on a Saturday; on the Monday morning following the mate of the *H.* made an entry in the ship's log of the circumstances of the collision. The master of the *H.* afterwards made a deposition relating to the collision before a receiver of wreck, under the Merchant Shipping Act, 1854, s. 448.

On the hearing of an action of damage brought against the *H.* by the owners of the *G.*, it was proved that the master and mate of the *H.* had died, and it was sought to render the entry in the log and the deposition evidence on behalf of the *H.*:—

Held, that the documents were not admissible.

This was an action instituted on behalf of the owners of the steamship *Gange* against the owners of the *Henry Coxon*, for the recovery of damages arising out of a collision between the two vessels on Saturday, the 12th of January, 1878, in Sea Reach in the River Thames.

July 6, 8. The action was heard.

After the witnesses called for the plaintiffs had been examined, one of the owners of the *Henry Coxon* was examined as a witness on behalf of the defendants, and gave evidence to the effect that, subsequently to the collision the *Henry Coxon*, having on board her the master and all the crew who had been on board her at the time of the collision, with the exception of the second engineer, had been despatched on a voyage to Riga; that she was known to have left Riga, homeward bound, on the 12th of June, 1878, and to have passed Copenhagen on the 15th of that month, but that nothing since had been heard of her, except that one of her boats had been picked up.

The second engineer of the *Henry Coxon* was also examined as a witness on behalf of the defendants. He stated that he had been below at the time of the collision; that the log of the *Henry Coxon* was in the handwriting of the first mate, who had been on deck at the time of the collision, and that the entry in it relating to the collision had been made on the Monday morning after the

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collision, and had been signed by the witness after it had been signed by the first mate.

Counsel for the defendants tendered the entry in question as evidence in the action. They also proposed to put in the deposition of the master of the *Henry Coxon*, taken on the 15th of January in this year, before the receiver of wreck, at the Custom House in London, in pursuance of the 448th section of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104.

Butt, Q.C., and *E. C. Clarkson*, for the defendants. The entry in the log relating to the collision is a contemporaneous entry made by a deceased person in the execution of his duty, and in the course of business: *Price* v. *Earl of Torrington* (1); Taylor on Evidence, p. 596, 7th ed.

The Admiralty Advocate (*Dr. Deane, Q.C.*), *Webster, Q.C.*, and *W. G. F. Phillimore*, for the plaintiffs. The entry in the log relating to the collision is not a contemporaneous entry, and is not shewn to be confined to a narrative of facts known to the person making it of his own knowledge. It would be most dangerous to extend the doctrine laid down in the case of *Price* v. *Earl of Torrington* (1) to such documents as ships logs; *Smith* v. *Blakey*. (2) The cases of *Nothard* v. *Pepper* (3), and *The Little Lizzie* (4), clearly shew that the master's deposition is not evidence which can be received.

Butt, Q.C., in reply.

SIR ROBERT PHILLIMORE. I have fully considered the questions of evidence which have been raised in this case. The *Henry Coxon*, made a voyage subsequent to that on which the collision in question in this action occurred, and since then she has never been heard of. It must, therefore, be concluded that she has perished with all hands; her crew on the voyage on which she was lost consisted of the same crew who were on board her at the

(1) Salk. 285; 1 Sm. L. C. 328 (7th ed.).

(2) Law Rep. 2 Q. B. 326.

(3) 17 C. B. (N.S.) 39. The 449th section of the Merchant Shipping Act, 1854, in force at the date when the case of *Nothard* v. *Pepper* (17 C. B. (N.S.) 39) was decided, is repealed by the Merchant Shipping Act, 1876, s. 45.

(4) Law Rep. 3 A. & E. 56.

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time of the collision, with the exception of one man, the engineer in charge of the engines, who was not on deck at the time of the collision. In these circumstances the log of the vessel which has perished is tendered by the defendants' counsel as being evidence in the action on the authority of various cases, the earliest of which was, I think, the case of *Price* v. *Earl of Torrington* (1); and it is contended that inasmuch as the entries in this log were made by the first mate of the *Henry Coxon* who was on board her when she started on the voyage on which she must have been lost, and were entries made by him in the course of his duty, and contemporaneously with the occurrence of the facts to which they relate, the Court ought to admit them as evidence in this case. Now, I think upon the whole, though the question is not without difficulty, that the principle to be gathered from the authorities which have been referred to is adverse to the admission of the log. I am not satisfied that the log can be considered in the light of a contemporaneous instrument. The collision took place on the Saturday, and the entry which the defendants' counsel have referred to appears not to have been made until the following Monday morning. I think it was to the interest of the person who made the entry relating to the collision to represent that the collision took place in consequence of the bad navigation of the *Gange* and not of his own vessel. There is another matter to consider. It seems to me that the authorities point to this, that entries in a document made by a deceased person can only be admitted as evidence, on the grounds on which it is sought to make this log admissible, where it is clearly shewn that the entries relate to an act or acts done by the deceased person and not by third parties. Now we all know as a matter of common knowledge in these proceedings, that it is the duty of the mate to enter not only the manœuvres that were executed on board his own ship, and all the matters relating to her navigation, but also to state what was the cause of the collision, and whether it was in consequence of the manœuvres and navigation of the other ship, and that which is set down in the log with respect to one of these sets of facts is ordinarily so inextricably mixed up with that relating to the other set, that it is difficult, if not impossible, to separate

(1) Salk. 285; 1 Sm. L. C. 328 (7th ed.).

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them so as to disentangle the parts of the entry relating to what was done by the vessel on board which the log was kept from those parts which relate to what was done by the other vessel. I think that this case does not come within the principle of the cases where evidence of this kind has been admitted. The question is one of extreme difficulty, but I think in the circumstances I must rule that this log is not admissible as evidence.

The defendants have also tendered in evidence the deposition made by the master of the *Henry Coxon* before the receiver of wreck in London. Now I know of no principle under which it would be admissible, on the contrary, I hold it to be quite clear that it is inadmissible. I do not, however, consider that the matter is res integra. The case of *Nothard* v. *Pepper* (1) has been cited, and I think that that case is in point, and that it is my duty to follow it. It is certainly true that in that case the party whose deposition was sought to be put in evidence was alive at the time of the trial, while the master of the *Henry Coxon* must be presumed to be dead. In my opinion, however, that circumstance cannot affect the decision I ought to pronounce. On the authority of the case I have referred to I must refuse to admit this deposition as evidence.

Solicitors for plaintiffs: *Gellatly, Son, & Warton.*
Solicitors for defendants: *Cooper & Co.*

(1) 17 C. B. (N.S.) 39.

1878
July 9.

THE PAPA DE ROSSIE. (W. 181.)

Taxation of Costs—Costs between Solicitor and Client—Refusal of Registrar to disallow Costs alleged to have been incurred through Negligence of Solicitor.

On a taxation between solicitor and client of the costs of a cause, objections were taken on behalf of the client to charges occasioned by the postponement of the trial and the amendment of the pleadings, on the ground that the postponement of the trial and the amendment of the pleadings had been rendered necessary by the negligence of the solicitor; the registrar refused to disallow the items, on the ground that it was not within his province as taxing master to inquire into the question of negligence:—

Held, on motion in Court to review the taxation, that the ruling of the registrar was right.

On the 3rd of July, 1877, an action of necessaries instituted on behalf of James Wright against the *Papa de Rossie* was, after having been called on for hearing before the judge in Court, compromised upon the terms that the plaintiff should have judgment for the amount sued for in the action, and that each party thereto should bear his own costs.

On a subsequent day the London agents of the solicitor, who had been originally retained by the plaintiff to conduct the suit on his behalf, and had acted therein up to the settlement of the action, brought in the plaintiff's costs for taxation, and the assistant registrar having, in taxing such costs, allowed certain items to the allowance of which the plaintiff objected, another solicitor who had been retained for the plaintiff in relation to the taxation, on the 1st of March in this year carried in the following objections to the taxation:—

The solicitor for the plaintiff objects to the allowance by the assistant registrar of the items in the two bills of costs of Mr. ——, formerly the plaintiff's solicitor, of and relating to the postponement of the trial of this cause on the 20th of June, 1877, and of the amendment of the reply, on the ground that such postponement and amendment were rendered necessary by the negligence or default of the said Mr. ——; that the affidavits used on the taxation raised this objection, and the facts are not disputed; and it is submitted that the question whether or not Mr. —— is entitled to charge such items against his client, the plaintiff, is a fit and proper matter to be dealt with by the said assistant registrar on the taxation.

On the 1st of April in this year, the assistant registrar, having

taken the objections to the taxation into consideration, decided that he ought to adhere to the view he had expressed on the taxation,—that a charge of negligence, even if it could be sustained, was not a ground for disallowing any costs necessarily incurred, but alleged to have been rendered necessary by such negligence, it being beyond his province as taxing officer to inquire into and decide such charge.

July 9th. *Muir*, on behalf of the plaintiff, moved the judge in Court to direct the assistant registrar to disallow the costs incurred in respect of the matters mentioned in the plaintiff's objections to taxation,—and to review his taxation upon such principles as the Court should lay down. He referred to Rule 26 of the Rules of the Supreme Court (Costs.)

E. C. Clarkson, on behalf of the solicitor who had brought in the costs for taxation, opposed the motion. If a solicitor has been guilty of negligently conducting the affairs of a client, the proper remedy of the client is by an action of negligence against the solicitor.

SIR ROBERT PHILLIMORE. In a case of this kind I should have thought it obvious that the proper course for the client to take would be to bring his action against the solicitor for negligence. If the plaintiff is liable to pay certain costs incurred by reason of the negligence of his solicitor, and brings his action against the solicitor, he will be entitled to recover damages. In the absence of any authority in support of the motion, I can only say that I am of opinion that the registrar decided rightly in this case.

Solicitors for plaintiff: *Ingledew & Co.*

Solicitors for the solicitor opposing the motion: *Fielder & Sumner.*

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July 9.

THE THEODOR KÖRNER. (B. 114.)

Practice—Inspection of Documents—Reports of Survey procured for the Purposes of Future Litigation—Damage to Cargo—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 6.

The defendant in an action of damage to cargo is not entitled to obtain from the plaintiff inspection of reports of surveys in possession of the plaintiff written and prepared solely for the purpose of the action.

On the 26th of March in this year, at the request of Messrs. Begbies, Ross, & Gibson, of London, a surveyor of shipping surveyed the German ship *Theodor Körner* for the purpose of ascertaining the cause of certain alleged damage to a portion of a cargo of wheat which she had brought from New York, and was then discharging in the London Docks, and the same day made his report of survey in writing. The next day the vessel was surveyed by another surveyor of shipping, who on that date made his report of survey in writing.

On the 8th of April an action under the 6th section of the Admiralty Court Act, 1861, was instituted on behalf of Messrs. Begbies, Ross, & Gibson against the *Theodor Körner*, and on the 1st of July a statement of claim was delivered in the action. It appeared, from allegations in the statement of claim, that the plaintiffs were indorsees of the bills of lading of the cargo of wheat which the *Theodor Körner* had brought from New York; that the vessel arrived in London in the month of March; and that the said cargo of wheat when delivered to the plaintiffs was delivered greatly damaged and deteriorated.

On or about the 18th of June the plaintiffs filed an affidavit of discovery. In such affidavit one of the plaintiffs deposed as follows: "I object to produce" (the reports of survey made by the two surveyors) "on the ground that they are documents written and prepared solely for the purpose of proceeding in the action."

July 9. *E. C. Clarkson*, on behalf of the defendants, the owners of the *Theodor Körner*, moved the judge in Court to direct the plaintiffs to give the defendants' solicitor inspection of the reports of survey referred to in the above-mentioned affidavit. He relied

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on the case of *Martin* v. *Butchard* (1), where, in a similar case, the Common Pleas Division had granted inspection.

[SIR ROBERT PHILLIMORE referred to the case of *Bustros* v. *White*. (2)]

Myburgh, on behalf of the plaintiffs, opposed the motion, on the ground that the documents, the inspection of which was sought, were privileged, under the authority of the decision of the Court of Appeal in the recent case of the *Southwark and Vauxhall Co.* v. *Quick*. (3)

SIR ROBERT PHILLIMORE. I do not see how, having regard to the language of the plaintiffs' affidavit, I can grant the motion. The affidavit states in effect that the plaintiffs have in their possession these two reports of survey, but that they object to produce them, on the ground that the documents in question were written and prepared solely for the purpose of proceeding in this action. This being so, I am of opinion if I did grant the motion I should be disregarding the principle, in accordance with which the Court of Appeal decided the case of the *Southwark Waterworks Co.* v. *Quick*. (3) This I cannot do. The motion must therefore be rejected.

Solicitors for plaintiffs: *Plews & Irvine.*

Solicitors for defendants: *Thomas Cooper & Co.*

(1) 36 L. T. (N.S.) 732.

(2) 1 Q. B. D. 423.

(3) 3 Q. B. D. 315.

1878
July 19.

[IN THE COURT OF APPEAL.]

THE FRANCONIA. (H. 347. 1877).

THE HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN-GESELLSCHAFT *v.* BURRELL AND OTHERS.

Limitation of Liability—Non-Liability of Shipowners in respect of Crew Space in Spar-Decked Steamer—Meaning of Gross Tonnage without any Deduction of Engine Room Space—German Ship—Order in Council of 26th of June, 1873—*Merchant Shipping Act,* 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 21, 22, 23—*Merchant Shipping Act,* 1862 (25 *&* 26 *Vict. c.* 63), *ss.* 54, 60—*Merchant Shipping Act,* 1867 (30 *&* 31 *Vict. c.* 124), *s.* 9.

The owners of a German steam-vessel instituted an action under the Merchant Shipping Act, 1862, s. 54, to limit their liability for damages occasioned by a collision. The vessel had three decks, and her crew were berthed below the spar deck. By Order in Council, dated the 26th of June, 1873, made under s. 60 of the same Act, it was directed that German steamships measured after the 1st of January, 1873, should be deemed to be of the tonnage mentioned in their registers in the same manner, and to the same extent, as the tonnage denoted in the certificate of registry of British ships was deemed to be their tonnage. In the register of this ship the crew space was deducted:—

Held, by the judge of the Court of Admiralty, that in estimating the tonnage for the purpose of limitation of liability the crew space must be deducted.

Held, by the Court of Appeal, that the Order in Council of the 26th of June, 1873, did not make the certificate of registry conclusive evidence of the tonnage or of the propriety of deducting the space solely appropriated for berthing the crew.

Held, further, that under the Merchant Shipping Act, 1854, s. 21, sub-s. 4, a closed-in space, solely appropriated to the berthing of the crew, is to be excepted in estimating the tonnage only when it is on the upper deck, and not when it is between the spar deck and the tonnage deck.

Held, also, that the crew space cannot in the case of a foreign, any more than of a British, ship, be deducted under the "Merchant Shipping Act, 1867," s. 9, unless the provisions of that section as to inspection by a surveyor appointed by the Board of Trade, and the other conditions therein contained, have been complied with; and therefore, that, as in the present case these conditions had not been complied with, the space appropriated for berthing the crew must not be deducted.

THIS was an action instituted on the 20th of November, 1877, on behalf of the owners of the German ship *Franconia*, to limit their liability, under the provisions of the 54th section of the Merchant Shipping Act, 1862, in respect to damage occasioned by a collision between the *Franconia* and the steamship *Strathclyde* (1).

(1) 2 P. D. 163.

The plaintiffs, by their amended statement of claim, after admitting that the collision with the *Strathclyde*, though occurring without the actual fault or privity of the plaintiffs, had been caused by the negligence of those on board the *Franconia*, and alleging that the gross tonnage of the *Franconia*, without deduction on account of engine-room, was 3098·45 tons, claimed inter alia that it might be declared that they and the ship *Franconia* were not answerable in damage on account of the collision in respect of loss or damage to ships, boats, goods, and other things to an aggregate amount exceeding 8*l.* for each ton of the *Franconia's* gross tonnage, without deduction on account of engine-room, such aggregate amount according to the above estimate of the tonnage being 24,788*l.*

On the 21st of December, 1877, the judge in Court pronounced that the plaintiffs were entitled to limited liability as claimed, and were answerable in damages in respect of loss or damage to ships, goods, and merchandize, on the occasion of the collision, to an amount not exceeding 24,788*l.*

On the 26th of February, 1878, before any further step had been taken in the action, the plaintiffs, having been advised that an error had been made in calculating the gross tonnage of the *Franconia* without any deduction for engine-room at 3098·45 tons, and that such error had arisen by reason of it having been erroneously supposed that, for the purposes of the action, the spaces solely appropriated to the berthing of the crew on board the *Franconia* ought to form part of and be included in the tonnage, applied by counsel to the judge in Court for leave to make such re-amendments in the statement of claim as would bring the question of the extent of the plaintiffs' liability again before the Court. The judge in Court gave the plaintiffs leave to amend their statement of claim, and in due course to enter the action afresh for a re-hearing.

On the 2nd of March the plaintiffs re-amended their statement of claim, by alleging throughout that the gross tonnage of the *Franconia*, without deduction on account of engine-room, was 2944·12, instead of 3098·45 tons, and by inserting 23,553*l.* instead of 24,788*l.*, as the amount to which they claimed to limit their liability.

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From the certificate of registry of the *Franconia*, it appeared that she was an iron screw steamer, brig rigged, with engines of 360 horse-power nominal, and was entitled to carry the German flag, and to all the rights, qualities, and privileges of a German ship; that she had been entered on the ship's registry, kept in pursuance of the law of the German Empire, on the 30th of May, 1874; that her tonnage measurement was taken by virtue of the order for ship's measurements of the 5th of July, 1872 (*Gazette of the Empire*, p. 270), and in full compliance therewith on the 28th of May, 1874, at Hamburg; and that the following was the amount of such tonnage measurement:—

	Registered British tons.
(*a*) Space under the measurement deck . . .	2228·03
(*b*) Space above the measurement deck:	
One space between decks	848·01
One round house	15·99
One other erection	6·42
Gross capacity of the ship	3098·45
From this is to be deducted:	
(1) Berths of crew which are between decks. .	154·33
(2) Spaces taken up by engines and boilers as well as by the fixed coal bunkers . . .	833·08
Nett capacity of the ship	2111·04 (1)

It was established in evidence that the *Franconia* had three decks, the uppermost of which was a spar deck extending from stem to stern; that the whole of the space on board her appropriated to the berthing accommodation of her crew, including the

(1) The original admeasurement of the *Franconia* made by the officials of the Customs at London was also put in evidence. This document, dated the 4th of March, 1876, was headed "Certificate of British Tonnage," and stated that the true registered tonnage of the *Franconia* admeasured agreeably to the mode directed by the Merchant Shipping Act, 1854, was 1952·62 tons, and that her principal dimensions and tonnage were as follows:—

As per German measurement, dated at Hamburg the 30th of May, 1874	3098·45	gross tonnage.
Allowance for Power . . .	991·50	British measurement.
	2136·95	register tonnage.
Crew space	154·33	German measurement.
	1952·62	

master, was below the spar deck, and between it and the main or tonnage deck; that she had no break, poop, or any other permanent closed-in space on the upper deck available for or appropriated to the accommodation of her crew; and that there was not permanently cut in any beam or cut in or painted in or over the doorway or hatchway of any place occupied by seamen or apprentices, or appropriated to their use, the number of men which it was constructed to accommodate, with any words whatever indicating the number of men it was constructed or intended to accommodate; and that no such words are cut or painted in any part of the ship.

May 14, 1878. The plaintiffs applied to vary the judgment by substituting 23,553*l.* for 24,788*l.*

W. G. F. Phillimore and *Stubbs*, for the plaintiffs. The 54th section of the Merchant Shipping Act, 1862, provides that the amounts beyond which shipowners seeking a limitation of their liability shall not be answerable shall depend upon "the tonnage" of the wrongdoing vessel, and in the case of steamships the meaning of the word "tonnage" is defined by the same section to be "the gross tonnage without deduction on account of engine-room." Up to the recent decision of the Court of Session in the case of *Burrell* v. *Simpson* (1) it had always been the practice for plaintiffs in causes of limitation of liability to consider the gross tonnage without deduction of engine-room referred to in the section to be the gross capacity of the ship without any deduction either on account of engine-room, or on account of spaces solely appropriated to the crew, and to calculate the limit of their liability accordingly. Having regard, however, to the decision in that case, the plaintiffs submit that the Court would be disregarding the provisions of the section if it did not hold the tonnage of the *Franconia*, for the purposes of the action, to be the number of tons apparent on the national certificate of registry of that vessel as her tonnage capacity, after such part of the tonnage space, denoted in such certificate to be space solely appropriated to the crew as did not exceed one-twentieth of her remaining tonnage, had alone been deducted. The defendants will probably

(1) 4 Sess. Cas. (4th Series) p. 177.

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contend that, inasmuch as the *Franconia* is a spar-decked steamer and her crew are berthed above her tonnage deck and below her spar deck, whilst the steamer before the Court in *Burrell* v. *Simpson* (1) could not from her size have had three decks, the decision in that case cannot afford any guide in the present. The plaintiffs, however, rely upon that case as laying down a principle applicable to all steamships, whatever may be the number of their decks. "The tonnage" defined in the 54th section of the Merchant Shipping Act, 1862, as "the gross tonnage without deduction on account of engine-room" can only mean the "register tonnage" plus the allowance for engine-room space, that is to say, the tonnage without deduction on account of engine-room, ascertained as directed by such of the provisions of the Merchant Shipping Act, 1854, with regard to tonnage measurements as are applicable. Now, the regulations with regard to the tonnage measurement of all vessels are contained in the 20th, 21st, 22nd, and 23rd sections of the Merchant Shipping Act, 1854, and of these sections the 23rd section, relating to an allowance to be made for the space occupied by the propelling power in steamers, is inapplicable, inasmuch as in order to ascertain the tonnage of the *Franconia* for the purposes of the action, no such deduction is to be made from her gross tonnage. Of the remaining sections, s. 20 declares that, in applying the rule contained in the 21st section, the second deck from below shall in ships like the *Franconia* be deemed the tonnage deck; and s. 21 lays down a rule of tonnage measurement called rule 1 (applicable to the *Franconia* and nearly all other ships), under which, by means of a computation as therein directed, the tonnage capacity of the spaces both below and above "the tonnage deck" is to be estimated. It is further provided by the same section that the tonnage under the tonnage deck shall be deemed to be the register tonnage of the ship "subject to the additions and deductions hereinafter mentioned." These words "additions and deductions" can only refer to the allowance for engine-room space in s. 23, which is not to be deducted in this case, and to the provisions of s. 21, sub-sections 4 and 5. Of these sub-sections, sub-section 4 must be construed as providing that, in calculating the tonnage of spar-decked as well as all

(1) 4 Sess. Cas. (4th Series), p. 177.

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other vessels, all spaces solely appropriated to the berthing of the crew either above or below the tonnage deck are not to be taken into account, except when the tonnage of such spaces exceeds one-twentieth of the remaining tonnage of the ship, and then only the excess over such one-twentieth of the remaining tonnage is to be added. The provisions with regard to the crew space on board British ships contained in the 9th section of the Merchant Shipping Act, 1867, applying as they all do to all such ships, whether spar-decked vessels or not, clearly shew that this construction of the 21st section of the Merchant Shipping Act, 1854, is the right one. The *Franconia* is a German ship and her tonnage capacity has been measured in Germany as required by the Order in Council of the 26th of June, 1873, made in pursuance of the 60th section of the Merchant Shipping Act, 1862, and is denoted on her certificate of registry. (1) The Court

(1) The following are the material portions of this Order in Council :—

Whereas by the Merchant Shipping Act Amendment Act, 1862, it is enacted that whenever it is made to appear to Her Majesty that the rules concerning the measurement of tonnage of merchant ships for the time being in force under the principal Act have been adopted by the government of any foreign country, and are in force in that country, it shall be lawful for Her Majesty by Order in Council to direct that the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificate of registry or other national papers, and thereupon it shall no longer be necessary for such ships to be remeasured in any port or place in Her Majesty's dominions, but such ships shall be deemed to be of the tonnage denoted in their certificates of registry or other papers in the same manner, to the same extent, and for the same purposes, in, to, and for which the tonnage denoted in the certificate of registry of British ships is to be deemed the tonnage of such ships.

And whereas it has been made to appear to Her Majesty that the rules concerning the measurement of tonnage of merchant ships now in force under the Merchant Shipping Act, 1854, have been adopted by the government of His Majesty the German Emperor, with the exception of a slight difference in the mode of estimating the allowance for engine-room, and such rules are now in force in that country, having come into operation on the 1st day of January, 1873, Her Majesty is hereby pleased by and with the advice of her Privy Council to direct as follows :—

. . . . . .

2. As regards steamships: that merchant ships belonging to the said German Empire which are propelled by steam or any other power requiring engine-room the measurement whereof shall after the said 1st day of January, 1873, have been ascertained and denoted in the registers and other national papers of such steamships testified by the dates thereof shall be deemed to be of the tonnage denoted in such registers or other national papers in the same manner and to the

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therefore cannot look behind the tonnage measurements apparent on such certificate, but must apply the directions contained in the 21st section to such measurements, instead of to the measurements which would if she had been a British ship have been taken under the same section.

E. C. Clarkson, (*Butt, Q.C.*, with him), on behalf of the defendants. The case of *Burrell* v. *Simpson* (1) is only material as an authority that, where in computing the tonnage of a steamer "crew space" has been properly deducted according to law, then the owners of such steamer on claiming a limitation of their liability under the Merchant Shipping Act, 1862, are entitled to the benefit of that deduction. The defendants, however, deny that, in the case of a spar-decked steamship, any deduction whatever is to be made on account of "crew space" below the spar deck. Under the Merchant Shipping Act, 1854, the liability of shipowners for damage done by their vessels, whether sailing vessels or steam vessels, depended on the value of the ship and her freight, the value of no part of the hull, or of the machinery, being deducted. It was then determined that the law should be altered, and in order to relieve steamship owners from being at a disadvantage compared with the owners of sailing ships of the same tonnage, owing to the great value of the machinery in steamers, the legislature provided that steamship owners, instead of being liable in proportion to the value of such machinery, should be liable according to the space that machinery occupied. The reason for such a change of the law is apparent. But what reason can there be for inferring that space occupied for the berthage of the crew is not to be taken into consideration in estimating the tonnage on which the limited amount of 8*l.* per ton is to be paid? The word gross tonnage is advisedly used in the 54th section of the Merchant Shipping Act, 1862, and obviously means the entire tonnage of the

same extent and for the same purpose in, to, and for which the tonnage denoted in the certificate of registry of British ships is deemed to be the tonnage of such ships; provided nevertheless that if the owner or master of any such German steamship desires the deduction for engine-room in his ship to be estimated under the rules for engine-room measurement and deduction applicable to British ships instead of under the German rule, the engine-room shall be measured and the deduction calculated according to the British rules.

(1) 4 Sess. Cas. (4th Series) p. 177.

ship without any deduction at all, and it is only ex majori cautelâ that the words "without deduction on account of engine-room" are added. The Order in Council of the 26th of June, 1873, is invalid and ultrà vires. It appears by the recitals in the Order in Council itself that a condition precedent, the performance of which alone could enable the Queen in Council to put the provisions of the 60th section of the Merchant Shipping Act, 1862, in force with regard to German ships, has not been fulfilled. The Order in Council does not recite that the rules as to measurement adopted by the German Empire are identical with the rules laid down in the Merchant Shipping Act, 1854, with respect to the measurement of British ships. But on the contrary, it is stated on the face of the order, that there is a difference with regard to estimating the engine-room space between the German rules and the English rules. This objection is a substantial one, for it can be shewn that owing to this difference the tonnage of the *Franconia*, denoted on her certificate of registry, is not the same by 150 tons, as her register tonnage would be if she had been measured under the Merchant Shipping Act, 1854. Even if the Court should be of opinion that the tonnage measurements denoted in the certificate of registry of this German ship are primâ facie binding, the Court, if it is of opinion that the tonnage has been erroneously computed, will order the vessel to be remeasured, in accordance with the rule contained in s. 21 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

Stubbs, in reply. *Cur. adv. vult.*

May 28. SIR ROBERT PHILLIMORE. The Court desires to express its obligation to counsel for the valuable assistance they have rendered to it by their arguments in this case. The owners of the *Franconia*, having admitted their liability for damage done to the defendants, have in a suit for the limitation of that liability under the Merchant Shipping Amendment Act, 1862, s. 54, stated erroneously, as they contend, the tonnage of the *Franconia* to be 3098 tons and a fraction. They now claim to have this error rectified by reducing the tonnage to a fraction over 2944 tons, the effect of which is to lessen their liability by about 154 tons; and a question of some difficulty and novelty is raised,

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whether, for the purpose of estimating the tonnage for which the plaintiffs in this suit are liable, the space solely appropriated to the berthing of the crew is or is not wholly or in part to be deducted.

The section just referred to, after limiting the liability for personal injury to an aggregate amount of 15*l.*, and in the case of damage to goods in an aggregate amount of 8*l.* for each ton of the ship's tonnage, proceeds as follows:—

> Such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine room: In the case of any foreign ship which has been or can be measured according to British law the tonnage as ascertained by such measurement shall, for the purposes of this section, be deemed to be the tonnage of such ship.

The *Franconia* is a steamship. The question is what is the meaning of the term gross, applied to the tonnage? In order to ascertain the meaning of this term, regard must be had to various sections of the Merchant Shipping Acts.

The 20th section of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, enacts that—

> Throughout the following rules the tonnage deck shall be taken to be the upper deck in ships which have less than three decks, and to be the second deck from below in all other ships.

Now the *Franconia* has three decks, and therefore her tonnage deck will be the second deck from below.

By the 21st section of the same Act, the tonnage is to be ascertained in a particular way as provided by rule 1 in the same section. By sub-s. 3 of this section, the register tonnage is to be ascertained by a computation from the areas as therein stated. But the tonnage so ascertained is to be subject to the additions and deductions therein after-mentioned. To these I will presently refer.

In sub-s. 4 of the same section, it is provided that

> If there be a break, a poop, or any other permanent closed-in space on the upper deck, available for cargo, or stores, or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained," in the manner there mentioned " and shall be added to the tonnage under the tonnage-deck, ascertained as aforesaid, subject to the following provisoes; first, that nothing shall be added for a closed-in space solely appropriated to the berthing of the crew, unless such space exceeds one-twentieth of the remaining tonnage of the ship, and in case of such excess the excess only shall be added; . . ."

Then there follows another provision in regard to deck passengers, which does not concern this case.

These clauses apply to the register tonnage of all ships. The 23rd section introduces a new proviso as to steamships and enacts that—

> In every ship propelled by steam . . . . an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship, ascertained as aforesaid, and the remainder shall be deemed to be the register tonnage of such ship.

And then follow rules for estimating the deduction. Gross tonnage is, I think, to be ascertained under the provisions of the 21st section above referred to, and one of these provisions is, under sub-s. 4, to deduct the space solely appropriated to the berthing of the crew, so far as it does not exceed one-twentieth of the remaining tonnage of the ship.

I return now to the 54th section of the Merchant Shipping Act, 1862, which enacts that the tonnage shall be "the registered tonnage in the case of sailing ships, and in the case of steamships the gross tonnage without deduction on account of engine room."

It is to be observed that this Act of 1862 provides that it shall be construed with and as part of the Merchant Shipping Act, 1854.

The contention that according to the language of the 54th section of the Merchant Shipping Act, 1862, the tonnage of the steamer is to be taken without deduction either for engine room or for berthage is, I think, erroneous, because the words "gross tonnage" in this statute ought to have the same construction as clearly must be put on them when used in the 23rd section of the Merchant Shipping Act, 1854.

I agree with the opinion expressed by the Lords of Session in the recent case (1876) of *Burrell* v. *Simpson* (1).

In that case the Lord President says (2):—

> What is meant here, I apprehend, by gross tonnage without deduction of engine room means just the actual tonnage without deduction of engine room, or in other words, the contrast between a sailing ship in this clause and a steamship is this, that in the case of a sailing ship the registered tonnage is to be taken; in the case of a steamship it is not to be the registered tonnage, but what is called the gross tonnage without the deduction of engine room which, if deducted, would

(1) 4 Sess. Cas. (4th Series) p. 177. (2) At p. 184.

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make it the registered tonnage. In short it is the want of the deduction of engine room that makes this gross tonnage instead of being registered tonnage.

It has been contended, admitting the law to be as I have stated it is, that in this case, inasmuch as the *Franconia* is a spar-decked ship, there is no closed-in space solely appropriated to the berthing of the crew, according to the true meaning of the words in the 4th sub-section of the 21st section of the Act of 1854, but I am unable to adopt this opinion. Having regard to all the provisions in the 20th, 21st, and 23rd sections, I think that the deduction from the tonnage in cases of closed-in spaces is applicable to the berthing space provided in a spar-decked ship.

Lastly, with regard to the argument respecting the certificate of registry of this German vessel.

The 60th section of the Merchant Shipping Act, 1862, provides that the Queen may, by Order in Council, direct that when the English rules for the measurement of tonnage of merchant ships have been adopted by a foreign government, the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificates of registry to all intents and purposes as if they were British ships. These measurement rules were extended to Germany by an Order in Council dated the 26th of June, 1873.

It has been contended that the Order in Council referred to is, on the face of it, invalid, inasmuch as it contains the words: "with the exception of a slight difference in the mode of estimating the allowance for engine room," thereby exceeding the authority conferred upon it by the statute. I am not inclined to put so rigid a construction upon the Order in Council, which in all substantial respects complies with the directions of the statute. Upon the whole I am of opinion that the plaintiffs are entitled to the reduction of the tonnage measurement which they claim. It only remains to observe that the plaintiffs admit that they have claimed to deduct about seven tons in excess of the number of tons they are empowered to deduct under the provisions of sub-s. 4 of rule 1, and that, consequently, the benefit of these seven tons must be given to the defendants.

The defendants appealed.

July 19. *Butt, Q.C., Clarkson,* and *Raikes,* for the appellants.

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This crew space cannot be deducted under the Act of 1854. The 21st section, sub-s. 4, provides for crew space on the upper deck not being included, but in sub-s. 5, relating to spar-decked ships, there is no provision made for deducting any space between decks. It is evident that the ship in *Burrell* v. *Simpson* (1) was not a spar-decked ship, and the point did not arise. The deduction cannot be made under the Act of 1867, s. 9, for the conditions of that section have not been complied with. The Order in Council is ultrà vires. A foreign certificate of registry is evidence of the measurements, but it cannot be used to decide the question whether a certain space has been properly deducted from the tonnage, which is a question of law. Section 60 of the Act of 1862 does not make the certificate conclusive evidence of the tonnage.

Benjamin, Q.C., Phillimore, and *Stubbs,* contrà. The meaning of "gross tonnage" under the Act of 1854 is shewn by *Burrell* v. *Simpson* (1), which shews that the crew space is to be deducted under that Act.

[JAMES, L.J. I cannot see that the construction of s. 21, sub-s. 4, was discussed in that case.]

Unless crew space is to be deducted, there is nothing to satisfy the plural word "deductions" in s. 21, sub-s. 3, there being only one other deduction. Then by the Order in Council the certificate of registry is evidence of the tonnage; it gives the whole tonnage and the amount deducted; and the certificate being made conclusive as to the registered tonnage the deductions must be taken to have been properly made. It is urged that this ship has not complied with the conditions which entitle the owners of a ship to deduct crew space under s. 9 of the Act of 1867. The answer to that is, that being a German ship she could not literally comply with them; and that it must be understood that the legislature did not intend a foreign ship to be subject to the condition of being surveyed by a surveyor appointed by the Board of Trade. The Order in Council makes the registry conclusive evidence of the tonnage, and the Court cannot go behind it.

JAMES, L.J. I am of opinion that the order of the learned judge cannot be sustained. He appears to have proceeded on the

(1) 4 Sess. Cas. (4th Series) p. 177.

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case of *Burrell* v. *Simpson* (1), but when that case is considered, it is really no authority upon the question, because the point which is raised here, as to the difference between a closed-in space between decks and a closed-in space above the upper deck, was never before the Court at all, and I gather from the absence of all reference to it that the crew space there was a crew space which was clearly within s. 21, sub-s. 4 of the Act of 1854, and that the only point really in controversy in that case was, whether in a steamship the gross tonnage mentioned in s. 54 of the Act of 1862 was to be taken as the tonnage, with the deductions which have to be made in a steamship other than engine room, or whether it was to be gross tonnage without any deduction whatever; and no question arose as to whether the space in question was one which ought to be excluded under s. 21. I have not heard anything in answer to the arguments of Mr. Butt, which pointed out that there was a very distinct provision in the Act of 1854 that, where the crew were lodged on the upper deck, the closed space which would otherwise be charged should not, if appropriated for the convenience of the crew, be included for the purposes of tonnage, and that then, under sub-s. 5, the whole measurements between the decks are to be taken without any deduction. I therefore have no doubt that, upon the construction of that first Act of Parliament, no deduction ought to have been made for the berths of the crew below the spar-deck. After that Act came the Act 30 & 31 Vict. c. 124, which makes provision for the better security and health of English seamen, and contains (s. 9) very detailed provisions, requiring certain things to be done, certain inscriptions to be put on a beam and on the doors, a certain quantity of air to be secured to each seaman, and so on, and requires that the ship shall be inspected and certified, and when that is done, when those provisions are all complied with, then there shall be a further allowance for the space occupied by the sailors' berths, the allowance being made expressly subject to the performance of all those conditions, and being made by way of bounty to the shipowners for making provisions for the health of the seamen. It is not pretended that those conditions have been complied with, or can have been complied with, by the respondents' ship in this case. It does not

(1) 4 Sess. Cas. (4th Series) p. 177.

appear that the ship ever was examined by a surveyor. The fact is proved that it had not got the proper announcement (at all events on the beam) of the accommodation provided for the seamen. The ship, therefore, has not brought herself within the last Act of Parliament, and cannot be allowed the deductions given by that Act.

Mr. Benjamin contends that if an English certificate of registry had shewn the gross tonnage and the amount of registered tonnage, deducting the tonnage of the berths, the register would be conclusive evidence that all the provisions of the Act of Parliament had been complied with, and that the Court would have been precluded from going behind it, even on the most conclusive evidence that there had been some mistake made or some error committed by some of the parties, and that under 25 & 26 Vict. c. 63, s. 60, and the Order in Council, the effect of the German certificate of registry is the same. I cannot agree with that argument. The certificate of registry is, no doubt, primâ facie evidence of the tonnage, and the 60th section of the Act of 1862 enables the Queen in Council to give the same effect to the certificate of registry of a foreign ship. All it authorizes the Queen in Council to do, and all the Queen in Council has done, as was very well put by Mr. Benjamin in his argument, is that it has authorized all our people to accept the measurements made by the Germans exactly in the same way as if they had been made in England.

All we have got before us, then, is that the gross tonnage is so much, that the actual measurement of the room occupied by berths is so much, and the actual measurement of the room occupied by engine, boilers, and coal bunkers is so much, that is to say, those measurements, as actual measurements, are to be taken as the true measurements. This is all that the order in council does, and I quite agree with the judge below in the opinion that this order was not ultrà vires. But the legal result of those measurements, that is to say, whether the crew space is to be deducted, is something beyond the power which is given to the Queen in Council to declare. We take the German certificate to be true, and therefore take the actual crew space to be 154 tons. The question whether it is or is not to be deducted is a question of English law, to be determined by an English court upon the Act of

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Parliament, and not to be determined by an Order in Council giving a certain recognition to the German certificate.

I am of opinion, then, that we are bound to hold, upon the construction of the Act of Parliament, that the berths between decks are not to be deducted for the purposes of this suit.

BRETT, L.J. I cannot agree with the judgment of the learned judge of the Admiralty Court, except that I agree with him in the view that the Order in Council is not ultrà vires. I cannot adopt the argument of Mr. Butt upon that point, and I think it is not ultrà vires for the reason given by the learned judge of the Admiralty Court, viz. that it is substantially in accordance with the statute. That Order in Council is to have a certain effect, which is stated in ss. 60 & 61 of the Act of 1862. By s. 60 the result is that the certificate of registry of a German ship is to be accepted in our courts, and the German ship shall thereupon be deemed to be of the tonnage denoted in those certificates, "in the same manner, to the same extent, and for the same purposes in, to, and for which the tonnage denoted in the certificates of registry of British ships is deemed to be the tonnage of such ships."

Mr. Benjamin argues that if this were a British register, it would be conclusive. I cannot agree with that. I know of no law which says that the register is to be conclusive for all purposes. I apprehend you are entitled to look behind the register, and to see whether the provisions of the Act of Parliament, on which and in virtue of which the register was made, were complied with. I think that a German certificate is no more conclusive than a British certificate would be. We are only to consider it as determining the tonnage in the same manner and to the same extent as if it was a British register. We should be entitled to see whether a British register was made according to the Act of Parliament which authorizes it to be made. Therefore the question comes to be whether in this case the register is made according to the provisions of the Act of Parliament, or would have been so made if it had been a British ship.

Now, it is said, first, that the crew space ought to be deducted by virtue of the statute of 1854. It seems to me that this particular crew space cannot be deducted under that Act.

I agree that the 21st section applies to the measurements both of steamships and sailing ships, and that if you have a crew space brought within the terms of s. 21, it is to be deducted before you arrive at the gross tonnage of the ship. I think that s. 23 gives to a steamship, besides the deductions which are given in s. 21, another deduction, that is for the engine room, and that therefore a steamship, under ss. 21 and 23, is entitled to deduct, in order to get at her registered tonnage, such crew space as is provided for in s. 21, and also the engine space under s. 23. The question, therefore, is whether, in order to arrive at the gross tonnage in the present case, you ought to deduct the crew space. It seems to me that this cannot be done under s. 21 of the Act of 1854, for this simple reason, that the crew space is not on the upper deck.

It is said that the Scotch case of *Burrell* v. *Simpson* (1) decides that it does not signify, under the Act of 1854, whether the crew space is on the upper deck or between decks. A Scotch decision is to be treated with great respect, but is not a binding authority, and supposing the Scotch Court to have decided that point, if we differed from it we should be entitled to decide differently. But I cannot think that the Scotch Court did decide that point. If the crew space there was a space on the upper deck, it clearly came within the terms of s. 21, and from the absence of all discussion on the point it is to be inferred that it was so, and the only question appears to have been whether the terms of s. 54 of of the Act of 1862 prevented its being deducted, and I entirely agree with the Scotch Court in saying that they did not.

Then it is said that this space can be deducted under the Act of 1867, for that it could have been so deducted if this had been a British ship. The answer to that seems to me to be that if this had been a British ship this space could not have been deducted, because it is clear upon the facts that this case was not brought within the Act of 1867. That there was no cutting in the beam may be considered a trifle, but there is a much more material fact that there has been no survey and allowance by the proper officer whom the English legislature has trusted with this duty, that is to say, a surveyor of the Board of Trade. The English legislature has not thought fit to intrust any ordinary surveyor with the

(1) 4 Sess. Cas. (4th Series) p. 177.

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power of giving these certificates, but only an authorized surveyor of the Board of Trade, and therefore this crew space is not brought within the Act of 1867.

It is said, as I understand, that we may apply to this ship the rule in the Act of 1867, without compliance with the conditions, because it is a foreign ship. It seems to me if we did that we should legislate. If the legislature in passing the Act of 1867 has overlooked the cases of foreign ships, we cannot help that. Those who think they have overlooked it inadvertently must go to the legislature and get the Act of Parliament altered. We have only to construe the Act.

The result is that the gross tonnage in the present case is the gross tonnage, without deducting either crew space or engine room.

COTTON, L.J. The question we have to decide is what, under the Act of 1862, s. 54, is to be considered the gross tonnage of a steamship without any deduction on account of engine room. For that we are thrown back on the Act of 1854, s. 23, which is the first section that mentions steamships, and provides that in cases of steamships a deduction is to be made "from the gross tonnage of the ship ascertained as aforesaid" for the space occupied by the propelling power. The gross tonnage there referred to is to be ascertained under s. 21; and the question is, whether that section allows for all ships a deduction for the crew space, except where the crew space is in some erection on the upper deck? And in our opinion it does not. There are two sub-divisions of s. 21 bearing on the point. Sub-s. 4 deals with the case of there being a poop or other closed-in space on the upper deck, without reference to the question whether it is a spar deck or not. It does not refer to the case of a closed-in space above the tonnage deck, but simply to a closed-in space on the upper deck, whichever that may be, and provides for the measurement of that space, subject to a proviso that no addition is to be made for a closed-in space solely appropriated to the berthing of the crew, unless it exceeds a certain amount. The whole sub-division, in my opinion, only applies to the case where there is a provision made for the berthing of the crew on the upper deck. Then sub-division 5 deals with

the case with which we have here to deal—the case of a vessel having a spar-deck—but there is no exception made of a space between the spar-deck and the tonnage deck, which is appropriated for the crew.

A case in the Court of Session was referred to, and of course we should regard with the greatest respect any opinion expressed by the judges there, but it is not shewn whether the ship in that case was a ship which had a spar deck, with accommodation of the crew between that and the tonnage deck, or was a vessel which had accommodation for the crew on the upper deck; and until it is shewn that the former was the case, we cannot consider the judges as having expressed an opinion upon the point which arises here.

Then we come to the question whether, under the Order in Council made under s. 60 of the Act of 1862, the certificate of registry is conclusive. It was not contended that, if the matter turned upon the Act of 1854 without the Act of 1862, the *Franconia* could rely upon that certificate as being conclusive that the crew space ought to be deducted, because it appeared on the face of the certificate that the crew-space was between decks; and of course it must depend upon the true construction of the Act of Parliament, not upon the certificate, whether or no crew space can properly be deducted. But, in my opinion, the true effect of the section of the Act of 1862 and the Order in Council is this, that the measurement is to be taken as sufficient, and that when her Majesty is satisfied that a foreign nation has adopted our principle of measurement, the ship need not be measured when any question arises as to the proper measurement in this country; but it was never intended that where a question arises whether, upon the true construction of an English Act of Parliament, a certain deduction ought to be made, and a foreign certificate treats it as a deduction which ought to be made, that certificate should be binding upon the courts in this country.

The Court, then, must, without regard to the certificate, decide the question whether the *Franconia* is entitled, under the Act of 1867, to deduct the crew space. I need not add anything to what has been said by the Lords Justices on that question. The deductions to be allowed under that Act are subject to certain

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stipulations and conditions. It may or may not be an oversight that those conditions are such that a foreign ship cannot, except under very special circumstances, get the benefit of the Act; but the foreign ship is coming here to get the benefit of the limit of liability afforded by an English Act of Parliament, and if it is to get the benefit of that it must take it of course with all the burdens imposed by the Act. One of these burdens is that the crew space, if between decks, is to be counted in, unless certain things are done as required by the Act. Those things have not been done in the present case, and we are unable to say that the *Franconia* is entitled under the Act of 1867 to deduct crew space when she has not complied with the requisitions of that Act, when she has not got the necessary certificate of survey, or the proper words put up shewing that proper accommodation had been provided for the crew.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Gellatly, Son, & Warton.*

July 30.

THE ANDALUSIAN. (L. 339. LIV.)

Limitation of Liability — Meaning of Recognised British Ship—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 19, 106, 516—*Merchant Shipping Act*, 1862 (25 & 26 *Vict.*), *c.* 63, *s.* 54.

A newly built vessel, exceeding fifteen tons burden, on being launched ran into and damaged a passing ship. The owners of the damaged ship thereupon instituted an action in this court against the newly built vessel to recover for the damage done to their ship, and this Court pronounced the vessel proceeded against solely to blame for the collison. Afterwards an action of limitation of liability was instituted by the owner of the newly built vessel, a natural born English subject, who therein claimed a declaration that he was entitled to a limitation of liability in respect of damage occasioned by the collision.

At the hearing of the action it appeared that the newly built vessel, though registered as a British ship at the time of the institution of the action, was not so registered at the time of the collision:—

Held, that the vessel was not a "recognised British ship" when the collision occurred, and that her owner was not entitled to have his liability limited.

THIS was an action of limitation of liability instituted in the month of July in this year, on behalf of the owner of the *Andalusian*, against the owners of the ship *Angerona*, the owners of her cargo,

and her master and crew, for the purpose of obtaining inter alia a declaration that the plaintiff was entitled, under the provisions of the Merchant Shipping Acts, to a limitation of his liability in respect of the damages arising out of a collision which took place on the 14th of July, 1877, when the *Andalusian*, on being launched from the plaintiff's shipbuilding yard on the Cheshire side of the river Mersey, ran into and damaged the *Angerona* as the latter vessel was passing down the river in tow of a tug.

The statement of claim, after stating that the plaintiff was a natural born English subject, and at the time of the collision was the sole owner of the steamship *Andalusian*, and setting out the facts relating to the collision, and that in consequence of the same the *Angerona* and her cargo was damaged, and certain personal effects of her master and crew were lost and damaged, alleged inter alia in substance as follows:—

5. An action—1877. Letter A., No. 342, Liverpool District Registry—was brought in the Probate, Divorce, and Admiralty Division of this Court by the owners of the *Angerona*, the owners of her cargo, and her master and crew, against the plaintiff, as owner of the *Andalusian*, for the recovery of damages in respect of the loss of or damage to the *Angerona* and her cargo, and the said personal effects; and on the 7th day of August, 1877, judgment was given in the said action, and the plaintiff was thereby condemned in the damage proceeded for and in costs, and the usual reference to ascertain the amount of the said damage was ordered. (1)

6. The plaintiff is apprehensive that other claims may be made upon him in respect of loss of goods on board the *Angerona* at the time of the said collision.

7. The said collision was occasioned by the improper navigation of the *Andalusian*.

8. No loss of life or personal injury was occasioned by the said collision.

9. The said collision happened without the actual fault or privity of the plaintiff.

10. At the time of the said collision the *Andalusian* had been built as and for a British ship, and all the measurements necessary for the purpose of her registration (except crew space) had been made before she was launched, but she was not actually registered till the 24th of September, 1877. The plaintiff had not, at the time of the said collision, been guilty of any breach or non-observance of any of the provisions of the statutes then in force relating to the measurement and registration of British ships.

11. Since the said collision the *Andalusian* has been completely measured and registered in accordance with the provisions of the said statutes; and the plaintiff has in all respects complied with such provisions.

12. The gross tonnage, as finally registered, of the *Andalusian*, with de-

(1) See *The Andalusian*, 2 P. D. 231.

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duction for crew space, but without deduction on account of engine room, is 1722·52 tons.

13. The plaintiff hereby offers to pay into court, in respect of his liability for loss of or damage to the said ship *Angerona* and her boats, and the goods, merchandise, and other things on board her at the time of the said collision, the sum of 13,780*l.* 3*s.* 3*d.*, being the aggregate amount of 8*l.* per ton for each ton of the gross tonnage of the *Andalusian*, without deduction on accouut of engine room, together with such interest thereon as the Court shall direct, for distribution among such persons as shall establish their claims in respect of such loss or damage.

THE statement of claim then claimed a declaration of limitation of liability in the usual form applicable to the case.

The defendants, in the 1st paragraph of their statement of defence, denied that the launch, then or afterwards called the *Andalusian*, was a ship within the meaning of the Merchant Shipping Act, 1862, on the 14th of July, 1877, and after stating in paragraph 2 that the plaintiff was the builder of the launch, and had on the said 14th of July, 1877, the control and management of it, and of the operation of launching it, alleged in so much of the 3rd and subsequent paragraphs of such statement of claim as is material in substance as follows:—

3. The launch, through the negligence of the plaintiff or of his servants, came into collision with and damaged the ship *Angerona* and her cargo, and the personal effects of her master and crew, at the time and in the circumstances stated in the statement of claim. The damage so done was not caused by improper navigation of the launch within the meaning of the Merchant Shipping Act, 1862.

4. At the time of the said collision and damage the launch, which was intended to be a steamship, had in her no engines, boilers, or machinery, had no masts, yards, or sails, or other means of propulsion or navigation, and was in many other respects incomplete and unfinished, and could not have been used as a ship. It had no master or crew on board it.

5. At the time aforesaid the launch had not been surveyed as required for a ship by the Merchant Shipping Act, 1854, and it had not been and could not have been measured for the purpose of calculating its tonnage, and it had no tonnage within the meaning of the Merchant Shipping Act, 1862.

6. Judgment in the action referred to in the statement of claim was recovered against the plaintiff, and not in rem against the launch.

8. The defendants do not admit any of the allegations in paragraphs 9, 10, 11, and 12 of the statement of claim, except that the launch was not registered till the 24th of September, 1877.

The plaintiff delivered a reply, joining issue on the 1st, 2nd, and 5th paragraphs of the statement of defence, and alleging, with

respect to the 4th paragraph of the statement of defence, that the *Andalusian* was ready to receive her engines, boilers, machinery, masts, yards, and sails, then ready to be placed in her, and that she was not, otherwise than admitted, incomplete or unfinished.

July 24. The action was heard before the judge in Court.

Witnesses for the plaintiff were examined orally in Court, and the register of the *Andalusian* was put in. No witnesses were called for the defendants. The plaintiff was called as a witness on his own behalf, and stated that he was a natural born British subject, and the owner of the *Andalusian*, but that he had not had any direction or control over the operation of launching her. The result of the evidence given by the other witnesses can be gathered from the judgment.

Sir J. Holker, A.G., Butt, Q.C., and *E. C. Clarkson*, for the plaintiff. If the *Andalusian* at the time of the collision was "a British ship" within the provisions of the 54th section of the Merchant Shipping Act, 1862, and if the damage done by her was done by her in the course of navigation, the Court will, without doubt, hold that the plaintiff is entitled to have his liability for such damage limited in accordance with the provisions of that statute. The first question then is—Was the *Andalusian* on the 14th of July, 1877, "a ship" within the meaning of the Merchant Shipping Acts? This question must clearly be answered in the affirmative. The interpretation clause (s. 2) of the Merchant Shipping Act, 1854, which Act is to be construed as part of the Merchant Shipping Act, 1862, defines the term "ship" as including every vessel used in navigation not propelled by "oars," and must certainly extend to a vessel such as the *Andalusian* was when the collision occurred. At that time she was complete, with the exception of her masts and sails and such of her steam machinery as could not have been placed on board her until after she had been launched. Indeed, even an unfinished vessel in the builder's yard has been decided to be a "ship": *Ex parte Hodgkin.* (1) With regard to the question whether the *Andalusian* at the date of the collision was a British ship, and therefore a ship to which the provisions of the 54th section of the Merchant

(1) Law Rep. 20 Eq. 746.

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Shipping Act, 1862, could apply, it will, no doubt, be contended on behalf of the defendants that, as the *Andalusian* was not in fact registered when the collision happened, her owner must be excluded by the operation of the Merchant Shipping Act, 1854, ss. 19, and 516, from the right given to owners of British ships of limiting their liability. But these sections are not applicable to the present case. The 54th section of the Merchant Shipping Act, 1862, is in terms extended to "any ship whether British or foreign." In the first place, these words, if taken in their ordinary meaning, would surely include the *Andalusian*, for when the damage in this case was done that vessel belonged to the plaintiff, a natural born British subject qualified to own a British ship under the 18th section of the Merchant Shipping Act, 1854; and in the second place, the provisions of that Act, enacting that a ship belonging to British subjects shall not be recognised as a British ship unless registered as thereby required, must only have been intended by the legislature to apply to cases where registration was necessary, and had been omitted through the default of the shipowner. Now, as the 23rd section of the Merchant Shipping Act, 1854, requires that the engine room space should be deducted, in order to arrive at the registered tonnage in steamships, the *Andalusian*, having been as a matter of necessity launched without her engines, could not have been put on the register before the collision and the plaintiff was guilty of no default whilst she remained unregistered. He in fact placed her on the register as soon as it was practicable for him to do so, and she was on the register at the date of the institution of the action. To hold that in such a case the limitation of the shipowner's liability is taken away would be straining the words of the 54th section of the Merchant Shipping Act, 1862. Moreover, it is not unimportant to notice that that section does not refer to the "registered tonnage," but only to the gross tonnage of steamers. If the legislature had meant to confine the section to registered British steamers, why should it not have done so in express terms?

The damage or loss in respect of which the plaintiff asks to limit his liability in damages, was damage or loss caused by reason of the improper navigation of the *Andalusian*, without the actual

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fault or privity of the plaintiff. Damage by reason of improper navigation, though including damage occasioned by whatever is improperly done with a ship during the course of a voyage: *Good* v. *London Steamship Owners' Association* (1) is not confined to such damage, but extends to anything improperly done with a ship in motion on the water, and is therefore an expression rightly describing the damages sustained by the defendants in this case: *Laurie* v. *Douglas.* (2)

Benjamin, Q.C., and *Myburgh*, for the defendants. The 516th section of the Merchant Shipping Act, 1854, provides that the ninth part of that Act, relating to the limitation of the liability of shipowners in respect of damage caused by improper navigation, shall only apply to such British ships as are within the meaning of the same Act "recognised British ships," an expression which is by the 19th section exclusively confined to such British ships required to be registered, i.e., employed in British waters and above fifteen tons burden, as have obtained registration. It therefore follows that inasmuch as the 54th section of the Merchant Shipping Act, 1862, which is now the ruling enactment with regard to the limit beyond which the liability of shipowners coming within it shall not extend, is to be read as incorporated with the ninth part of the Merchant Shipping Act, 1854, the only proper construction to be put on the provisions contained in such 54th section is that shipowners, who are owners of unregistered British ships required by law to be registered, are excluded from the benefits and privileges conferred by it. This construction is borne out by the provisions of the 106th section of the Merchant Shipping Act, 1854, and the judgment in the recent case of the *Union Bank of London* v. *Lenanton* (3), where the effect of placing a ship belonging to British subjects on the register, was much discussed. It is clear, then, that if the contention of the defendants on this point is right, the plaintiff cannot, as the *Andalusian* was not registered until after the collision, claim the relief he seeks. It is, however, contended that as it was always intended to register her, and as she was in fact registered before the commencement of the action, it would be wrong for the Court to hold

(1) Law Rep. 6 C. P. 563. (2) 15 M. & W. 746.
(3) 3 C. P. D. 243.

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that the plaintiff has not brought himself within the statute. It is, however, submitted that this contention must fail, for the power of claiming a limitation of liability under the Merchant Shipping Acts is a power restricting the right of obtaining compensation from a wrongdoer, and the conditions under which it has been conferred by the legislature ought for that reason to be strictly construed. It is quite immaterial that the *Andalusian* was actually registered before the commencement of the action, for the right of the defendants to be recouped the damage done to their property accrued the moment the wrongful act was done, and the case can only be treated as if the compensation to which the defendants were entitled had been paid at that time. Moreover, the provisions of the 54th section of the Merchant Shipping Act, 1862, require that the amount beyond which a claimant shall not be answerable shall be ascertained with reference to the registered tonnage of the wrongdoing vessel, and at the time of the accident the *Andalusian* had no registered tonnage. It was never intended that the expression "damage done by improper navigation" should extend to include damage done by a vessel in motion from the land into the water.

Sir J. Holker, A.G., in reply.

Cur. adv. vult.

July 30. SIR ROBERT PHILLIMORE. On the 14th of July, 1877, the *Andalusian*, a vessel in the imperfect and unfinished state of equipment, which is termed a launch, having been built in a building yard on the Cheshire side of the river Mersey, was launched into that river, and brought into collision with a ship called the *Angerona*, which ship brought an action against the *Andalusian*, in this court, and I pronounced that the *Andalusian* was to blame for the collision. The *Andalusian* now brings an action for limitation of her liability under the Merchant Shipping Acts, and this action is opposed on behalf of the *Angerona*, upon the grounds—first, that the *Andalusian* was not a ship; secondly, that she was not used in navigation at the time of the collision; and, thirdly, that she was not a British registered ship.

The Court is much indebted to the able and ingenious arguments of the Attorney General and Mr. Benjamin, upon all these

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points. By the 2nd section of the Merchant Shipping Act, 1854, it is enacted that "ship shall include every description of vessel used in navigation, not propelled by oars." I am disposed to consider that a ship of this character, in the imperfect state of a launch, might be included under this provision. The 18th section of the same Act provides that "no ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description." It is only necessary to mention one category, namely, "natural born British subjects." The *Andalusian* is proved to have been the property of a natural born British subject, and therefore is, in one sense, a British ship. The last and most important question remains to be considered. At the time of the collision this launch-ship had not her engines and boilers, and other portions of her machinery on board, and was not in a condition to be registered, and as a matter of fact, was not registered.

By the 19th section of the same statute, it is enacted that "every British ship must be registered in manner hereinafter mentioned," with certain exceptions which it is not necessary to mention, and it is further enacted that "no ship required to be registered shall, unless registered, be recognised as a British ship." The 54th section of the Merchant Shipping Act, 1862, limits the liability of shipowners with reference to the registered tonnage of sailing ships and the gross tonnage of steamships, without deduction on account of engine room; and the 516th section of the Merchant Shipping Act, 1854, provides, that nothing in that part of that Act which relates to limitation of liability, shall be construed to extend to any British ship not being a recognised British ship within the meaning of the Act. It has been contended by the Attorney General, that these sections should not be construed to deprive a vessel, such as this launch—not yet ripe for registration, but intended to be registered when the proper time has arrived, of the benefits of this limitation of liability; that it would be very harsh to put this construction upon the sections; that this launch is not a ship "required to be registered" because at the time of her being launched, she was not ready for registration, inasmuch as a launch cannot, and in this instance, did not, take place with all the machinery on board which it is necessary she should have at the time of registration; that she is not an offender against the

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law by reason of not having been fully registered, and that being owned by a British subject and intended to be registered, she might be recognised as a British ship.

After much consideration, I am unable to arrive at this conclusion. It is in the first place, to be remembered, that the limitation of liability is a creature of statute law; that upon general principles of jurisprudence and natural equity, as I think Dr. Lushington more than once said, the sufferer is entitled to a restitutio in integrum at the hands of the wrong-doer; that it is not a question of the launch being liable to a penalty for necessary non-registration, but a question whether she is entitled to a privilege which operates severely upon the sufferer, unless she brings herself strictly within the plain meaning of the provisions of the statute. Now, it appears to me, that however unfortunate it may be that the collision should have happened before the privilege of limitation of liability accrued, I think that it has so happened, and that with respect to this privilege at least, the Merchant Shipping Acts, from beginning to end, treat a registered British ship as the only recognised British ship entitled to this privilege. I must, therefore, reject the claim of the plaintiff in this suit, and there must be judgment for the defendants with costs.

Solicitors for plaintiff: *Duncan, Hill, & Dickinson.*
Solicitors for defendants: *Simpson & North.*

REGULÆ GENERALES.

RULES

(*Made in pursuance of* 10 *George* 4, *cap.* 53, *sec.* 9)

TO BE OBSERVED IN ALL CAUSES, SUITS, OR PROCEEDINGS INSTITUTED, OR TO BE INSTITUTED, IN

THE CONSISTORY COURT OF LONDON.

THE Vicar General and Official Principal in and throughout the Diocese of London having considered it expedient that Additional Orders should be made for further expediting and regulating the Proceedings of the Consistory Court of London, doth hereby in pursuance of 10 Geo. 4, c. 53, s, 9, Order that the following Regulations shall be observed from and after the 30th day of November, 1878, in all Causes as well pending as future.

ORDER XII.

1. The Judge may at any stage of a Faculty Case order a further Citation to Issue, and may for such purpose adjourn the hearing or further hearing of the Case, and may order the Faculty to issue in such terms as to the Judge shall seem just.

2. Applications to hear matters referred to the Court by the Lord Bishop of London for its opinion thereon shall be made to the Judge by Petition to be signed by the Applicant or Applicants, and to be filed in the Registry.

3. Copies of the Petition shall be delivered by the Petitioner to all Parties interested in the question raised by the Petition. The Parties interested may file answers to such Petition, and the Petitioner may file a Reply to such Answers within such times as the Judge shall order.

Thomas H. Tristram.

Nov. 30th, 1878.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

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2. —— *Crossing Ships—Rules for Navigation of the Thames, rule* 29.] Where one of two steamers in the Thames was steering parallel to the shore and the other was steering in an oblique course across the stream:—*Held*, that they were crossing vessels, so that under the 29th of the Rules of 1872 for the navigation of the Thames, the one which had the other on her own starboard was bound to keep out of the way of the other.—*The Velocity* (Law Rep. 3 P. C. 44) considered. The Oceano - - - - C. A. 60

3. —— *Limitation of Liability—Meaning of Recognised British Ship—Owners—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 19, 106, 516—*Merchant Shipping Act*, 1862 (25 & 26 *Vict.*), *c.* 63, *s.* 54.] A newly-built vessel, exceeding fifteen tons burden, on being launched ran into and damaged a passing ship. The owners of the damaged ship thereupon instituted against the newly-built vessel an action in this court to recover for the damage done to their ship, and this Court pronounced the vessel proceeded against solely to blame for the collision. Afterwards an action of limitation of liability was instituted by the owner of the newly-built vessel, a natural born English subject, who therein claimed a declaration that he was entitled to a limitation of liability in respect of damage occasioned by the collision.—At the hearing of the action it appeared that the newly-built vessel, though registered as a British ship at the time of the institution of the action, was not so registered at the time of the collision.—*Held*, that the vessel was not a "recognised British ship" when the collision occurred, and that her owner was not entitled to have his liability limited. The Andalusian - 182

4. —— *Limitation of Liability—Non-Liability of Shipowners in Respect of Crew Space in Spar-Decked Steamer—Meaning of Gross Tonnage without any Deduction of Engine Room space—German Ship—Order in Council of 26th of June*, 1873—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 21, 22, 23—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *ss.* 54, 60—*Merchant Shipping Act*, 1867 (30 & 31 *Vict. c.* 124), *s.* 9.] The owners of a German steam-vessel instituted an action under the Merchant Shipping Act, 1862, s. 54, to limit their liability for damages occasioned by a collision. The vessel had three decks, and her crew were berthed below the spar deck. By Order in Council, dated the 26th of June, 1873, made under s. 60 of the same Act, it was directed that German steamships measured after the 1st of January, 1873, should be deemed to be of the tonnage mentioned in their registers in the same manner, and to the same extent, as the tonnage denoted in the certificate of registry of British ships was deemed to be their tonnage. In the register of this ship the crew space was deducted:—*Held*, by the judge of the Court of Admiralty, that in estimating the tonnage for the purpose of limitation of liability the crew space must be deducted.—*Held*, by the Court of Appeal that the Order in Council of the 26th of June, 1873, did not make the certificate of registry conclusive evidence of the tonnage or of the propriety of deducting the space solely appropriated for berthing the crew.—*Held*, further, that under the Merchant Shipping Act, 1854, s. 21, sub-s. 4, a closed-in space solely appropriated to the berthing of the crew is to be excepted in estimating the tonnage only when it is on the upper deck and not when it is between the spar deck and the tonnage deck.—*Held*, also, that the crew space cannot in the case of a foreign, any more than of a British, ship, be deducted under the "Merchant Shipping Act, 1867," s. 9, unless the provisions of that section

COLLISION—*continued.*

as to inspection by a surveyor appointed by the Board of Trade, and the other conditions therein contained, have been complied with.—*Held*, therefore, that as in the present case these conditions have not been complied with, the space appropriated for berthing the crew must not be deducted. The Franconia - - C. A. 164

5. —— *Compulsory Pilotage in the Mersey—Mersey Docks Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 128—*Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 338.] A duly qualified Liverpool pilot having been employed to pilot a ship from sea into the Mersey and take her into dock, piloted her over the bar, but owing to the state of the tide being unable to dock her that day, anchored her in a clear berth in the river. The pilot remained in charge of the ship, and the next day the state of the weather being such as to render it unadvisable to take her into dock that day, she remained at anchor. In the course of that day, and whilst the pilot was in charge, the ship dragged her anchor and came into collision with a barque. In an action instituted by the owner of the barque against the ship the Court decided that the collision was caused solely by the negligence of the pilot in charge of the ship:—*Held*, that the owners of the ship were not answerable for the damage, for it was occasioned by the fault of a pilot acting in charge of the ship within a district where the employment of such pilot was compulsory by law. The Princeton - 90

6. —— *Regulations for Preventing Collisions at Sea, Art. 9—Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.] A French trawler and a schooner came into collision in the English Channel in the morning before sunrise. The trawler was proceeding at a speed of from two to three knots an hour. She had her trawl on deck and was about to let it go. A white light was exhibited at her masthead, but no side lights were exhibited. At the hearing of an action of damage to recover for the damages sustained in the collision, the Court found that the collision was caused by the absence of any look-out on board the schooner.—It was then submitted that the trawler had infringed the Regulations for Preventing Collisions at Sea by not exhibiting the regulation side-lights, and by reason of such infringement was in fault, within the meaning of the 17th section of the Merchant Shipping Act Amendment Act, 1873:—*Held*, that the trawler had infringed the Regulations by not exhibiting the Regulation side-lights:—*Held*, also, that, as in the absence of a look-out on the part of the schooner, the neglect of the trawler to observe the regulations as to lights could not by any possibility have contributed to the collision, the section had no application, and the schooner was alone to blame for the collision. The Englishman 18

7. —— *Sailing Regulations—Articles* 12 *and* 17—*Ships crossing—Ship overtaking.*] A ship and a barque were both on the port tack. The barque was the windward vessel, and had the wind three points free. The ship was close hauled, and when first sighted by the barque was approaching her on her lee beam:—*Held*, affirming the decision of the Judge of the Admiralty Court that the ships were crossing each other,

COLLISION—*continued.*

and that it was the duty of the barque, being the windward vessel, to get out of the way of the other.—The definition of an "overtaking ship" in *The Franconia* (2 P. D. 8) questioned. The Peckforton Castle - - - C. A. 11

CONTRIBUTION—Of shipowners to life salvage *See* Salvage. 1. [28

COUNTY COURT—*Jurisdiction to entertain County Court Appeal—The County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 31.] By a decree of the City of London Court an action of damage instituted in that court in the sum of 30*l.* was, after having been heard on the merits, dismissed with costs. The plaintiff appealed. At the hearing of the appeal the respondent objected to the jurisdiction of the Court to entertain the appeal.—The Court dismissed the appeal on the ground that as the appellant, if successful, could not have recovered more than 30*l.* in the action, he was precluded from appealing by the 31st section of the County Courts Admiralty Jurisdiction Act, 1868. The Falcon - 100

—— Claim for wages - - - 35
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CO-OWNERSHIP—*Sale of Ship in invitum of a Majority of Part-owners—The Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 8.] Since the passing of the 8th section of the Admiralty Court Act, 1861, the Court has a discretionary power to order the sale of a vessel proceeded against in an action of co-ownership, notwithstanding that the sale is opposed by the majority of the co-owners. The Nelly Schneider - - - 152

DAMAGE—Admission of liability—Costs of reference to registrar - - - 97
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DERELICT—Amount of salvage remuneration
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DISCOVERY—Reports of survey procured for the purposes of future litigation - 162
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EVIDENCE—*Collision—Non-admissibility in Evidence of Log kept by Mate who has subsequently died—Deposition before Receiver of Wreck—Merchant Shipping Act* (17 & 18 *Vict. c.* 104), *s.* 448.] Two vessels, the *H.* and the *G.*, came into collision on a Saturday; on the Monday morning following the mate of the *H.* made an entry in the ship's log of the circumstances of the collision. The master of the *H.* afterwards made a deposition relating to the collision before a receiver of wreck, under the Merchant Shipping Act, 1854, s. 448.—On the hearing of an action of damage brought against the *H.* by the owners of the *G.*, it was proved that the master and mate of the *H.* had died, and it was sought to render the entry in the log and the deposition evidence on behalf of the *H.*:—*Held*, that the documents were not admissible. The Henry Coxon - - 156

FOREIGN SHIP—Deduction in estimating tonnage - - - - - 164
See Collision. 4.

LIMITATION—Of liability—
1. British ship - - - 182
2. Foreign ship - - - 164
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See Collision. 6.

MERSEY—Compulsory pilotage in - - 90
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PILOTAGE—Compulsory - - - 90
See Collision. 5.

PRACTICE—*Inspection of Documents—Reports of Survey procured for the Purposes of Future Litigation—Damage to Cargo—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 6.] The defendant in an action of damage to cargo is not entitled to obtain from the plaintiff inspection of reports of surveys in possession of the plaintiff written and prepared solely for the purpose of the action. The Theodor Körner - - - 162

2. —— *Costs, Taxation of — Costs between Solicitor and Client—Refusal of Registrar to disallow Costs alleged to have been incurred through Negligence of Solicitor.*] On a taxation between solicitor and client of the costs of a cause objections were taken on behalf of the client to charges occasioned by the postponement of the trial and the amendment of the pleadings, on the ground that the postponement of the trial and the amendment of the pleadings had been rendered necessary by the negligence of the solicitor; the registrar refused to disallow the items, on the ground that it was not within his province as taxing master to inquire into the question of negligence:—*Held*, on motion in Court to review the taxation, that the ruling of the registrar was right. The Papa de Rossie - - - - - 160

RECEIVER OF WRECK—Deposition before 156
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REGISTRAR AND MERCHANTS — Award of amount less than that claimed - 97
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REGISTRY—Certificate of—How far conclusive evidence of tonnage - - 164
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RULES—Order XVI., r. 18 - - - 28
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SAILING RULES—Not exhibiting side lights 18
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SALE—Of ship without consent of majority of part owners - - -
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SALVAGE — *Contribution — Rules of Supreme Court, Order XVI., Rule* 18*—Non-liability of Shipowner for Life Salvage in cases where no Property belonging to them has been Salved.*] The *C.*, a Spanish steamship, fell in at sea with the *S.*, an English steamship, with signals of distress flying and entirely helpless from injuries sustained in a collision with a third vessel. The passengers of the *S.* and a quantity of specie, which had formed part of the cargo of the *S.*, having been taken on board the *C.*, attempts were made by the master and crew of the *C.* to tow the *S.* into safety. These attempts were ineffectual, and ultimately, after the master and crew of the *S.* had gone on board the *C.* the *S.* was abandoned, and her passengers, master, and crew were landed in safety at an English port. Afterwards the specie was arrested in an action of salvage instituted at the suit of the owners, master, and crew of the *C.*, who claimed in the action to recover for life salvage and for salvage services rendered to the *S.* and the specie. The owners of the specie appeared as defendants, and served a notice on the owners of the *S.* calling upon them to contribute to the remuneration claimed by the plaintiffs. Thereupon the owners of the *S.* appeared. At the hearing of the action the Court awarded salvage remuneration to the plaintiffs for the services rendered, but reserved all questions as to the liability of the owners of the *S.* The owners of the specie then moved the Court to declare that such portion of the sum awarded as was awarded for life salvage ought to be recouped to the owners of the specie.—The Court refused the motion on the ground that no property belonging to the owners of the *S.* having been salved they could not be held personally liable to pay any portion of the sum awarded. The Cargo Ex Sarpedon - 28

2. —— *Derelict—Amount of Award — Apportionment.*] A vessel constructed entirely for the purpose of conveying the obelisk known as Cleopatra's Needle from Alexandra to England, was, with the obelisk on board her, abandoned in the Bay of Biscay by her master and crew, and by the steamship employed to tow her to England, and the next day she was found floating on her beam ends about ninety miles north-east of Ferrol by another steamship, which succeeded in towing her into Ferrol in safety.—Subsequently an action of salvage was instituted to determine the amount of salvage remuneration to be paid to the salvors for the services rendered, and bail was given in the action in the sum of 5000*l.* By the consent of all parties, the judge in Court fixed the value of the property salved at 25,000*l.*—At the hearing of the action, the Court awarded 2000*l.* as salvage remuneration to the plaintiffs, and on a subsequent application apportioned the award as follows:—1200*l.* to the owner of the salving vessel; 250*l.* to her master, and the residue to be distributed

SALVAGE—*continued.*
among her crew according to their rating and services, as salvors. The Cleopatra - 145

3. —— *Her Majesty's Ships—Vessel belonging to Ramsgate Harbour—Board of Trade—Harbours and Passing Tolls Act*, 1861 (24 & 25 *Vict. c.* 47), *Pt. vii.—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 484, 485.] Under the Harbours and Passing Tolls Act, 1861, the harbour of Ramsgate and the property and powers of its trustees were transferred to the Board of Trade. In a suit for salvage remuneration for services rendered by a vessel belonging to the harbour and vested in the Board of Trade under the provisions of the Act:—*Held*, affirming the decision of the judge of the Admiralty Court, that the vessel was not a ship belonging to her Majesty within the meaning of the Merchant Shipping Act, 1854, ss. 484, 485; and therefore that the Board of Trade were not precluded from recovering salvage in respect of its services, and that the claims of the commander and crew might be adjudicated upon without the consent of the Admiralty. The Cybele - - - - - C. A. 8

4. —— *Services rendered by putting Hands on board Vessel Infected with Yellow Fever—Amount of Award.*] Two Norwegian barques, both bound to England, fell in with each other on the high seas, about 3000 miles from Liverpool; one of the barques was in distress, her first mate having died, and her master, her second mate, and one of the crew being sick with yellow fever. The other barque was short-handed, but her mate, with the consent of her master, went on board the distressed vessel and succeeded in navigating her to Liverpool. During the voyage, the master, the second mate, and two of the crew died. On the arrival of the vessel at Liverpool an action of salvage was instituted against her. At the hearing of the action, the value of the salved property was taken at 5135*l.* 13*s.* 2*d.*—The Court awarded 600*l.* to the mate who had gone on board the distressed vessel, 100*l.* to the owners of the salving vessel, 50*l.* to her master, and 150*l.* amongst the remaining plaintiffs. The Skibladner - 24

5. —— *Services rendered in setting Salvors in Motion—Amount of Award.*] A steam-tug, having a vessel in tow, saw a ship ashore and went out of her way to inform, and informed, another steam-tug of what she had seen. The other steam-tug thereupon proceeded to the stranded ship and towed her into safety. In an action of salvage instituted on behalf of both steam-tugs against the ship:—*Held*, that the owners, master, and crew of both steam-tugs were entitled to salvage remuneration. The Sarah - 39

SHIP—Not registered at time of collision - 182
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—— Sale of, without consent—Majority of part-owners - - - - 152
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24 & 25 Vict, c. 47, part vii. - - 8
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WAGES—*Jurisdiction—The County Court Admiralty Jurisdiction Act.* 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 2—*Wages calculated according to Profits of fishing Voyage—Damages for wrongful Dismissal.*] The words "any claim for wages" in the 3rd section of the County Courts Admiralty Jurisdiction Act, 1868, include a claim for damages for wrongful dismissal by the master of a vessel engaged under a special wages agreement. The Blessing - - - - - 35

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—— "Overtaking ship" - - - 11
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